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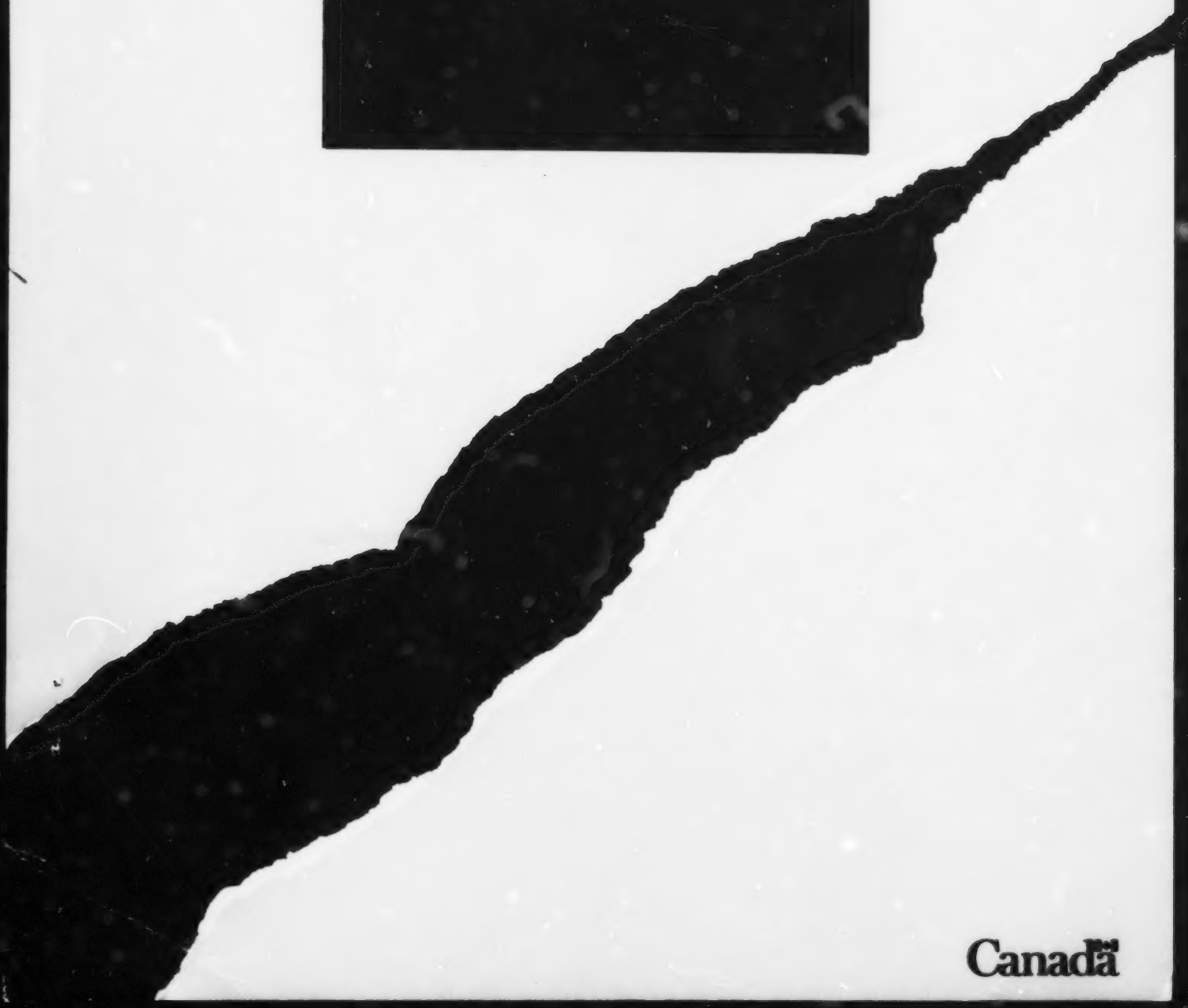

Canada

THE LEGAL POSITION OF THE GOOD SAMARITAN

by

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This report was commissioned by
Emergency Preparedness Canada
to clarify the legal position
of those who go to the aid of others
in emergencies

Note: Throughout this study the author has used masculine gender only. To avoid awkwardness and repetition, the text remains as written, although it is Government of Canada policy to accord equal importance to both men and women.

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INTRODUCTION

Luke 10:30-37

A certain man went down from Jerusalem to Jericho, and fell among thieves which stripped him of his raiment, and wounded him, and departed, leaving him half-dead.

And by chance there came down a certain priest that way; and when he saw him he passed on by the other side.

And likewise a Levite, when he was at the place, came and looked on him, and passed by on the other side.

But a certain Samaritan, as he journeyed, came where he was: and when he saw him, he had compassion on him.

And went to him, and bound up his wounds, pouring in oil and wine, and set him on his own beast, and brought him to an inn, and took care of him.

And on the morrow when he departed, he took out two pence, and gave them to the host, and said unto him, 'Take care of him; and whatsoever thou spendest more, when I come again, I will repay thee.'

Which of these three, thinkest thou, was neighbour unto him that fell among the thieves?

And he said, 'He that shewed mercy on him.' Then said Jesus to him, 'Go and do thou likewise.'

There are several ways in which the moral of this parable could be translated into law.

- The law could impose a legal duty on the passerby to render assistance to a person in distress. The failure to do so without good reason might be made a criminal offence punishable by fine or imprisonment. It might instead give the neglected victim a right to sue for damages. Breach of the legal duty could give rise to both criminal and civil liability.

- Instead of requiring the passerby to stop and render assistance, the law could leave the ultimate decision to the individual but create conditions that would encourage him to do his moral duty. It could confer upon the good samaritan immunity from suit if his attempts to provide assistance were unskilful, though well-meant. It could ensure that he would be compensated for any injuries and

indemnified against losses incurred as a result of rendering assistance. The good samaritan might also be entitled to be rewarded for his efforts.

- The law could adopt the "stick" and "carrot" approach.

As will be seen, the common law jurisdictions have traditionally resisted the idea of imposing an affirmative legal obligation to go to the aid of a stranger in distress. A distinguished English judge said in a recent decision of the House of Lords:

> The conduct of the parabolic priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal....[1]

This statement holds true in Canada, the rest of the Commonwealth and, with only slight qualification, in the United States. Nor has the common law reached the stage of making such conduct actionable in tort. As an American judge once observed,

> [T]he priest and Levite who passed by on the other side were not...liable at law for the continued suffering of the man who fell among thieves, which they might, and morally ought to have prevented or relieved.[2]

Instead, the common law jurisdictions rely mainly on various "carrots" or inducements, to persuade the citizen to act as a good samaritan, while leaving the ultimate decision to his conscience. The incentives to intervene and render assistance are found mainly in judge-made doctrines designed to minimize the risks to the good samaritan of loss or liability. In a few provinces and throughout the United States, the protection afforded by the common law is supplemented by legislation. In some cases, the additional statutory protection is restricted to certain groups, notably the medical professions.

The reluctance of the common law to impose a legal duty to render assistance to someone in dire need is usually explained on several grounds. One concerns the philosophy of the common law and the view that its proper function is to keep the peace and prevent people from harming one another, rather than to require them to confer benefits on each other merely because they are all human beings.[3] Another stems from the conceptual distinction between acts and omissions, or "misfeasance" and non-feasance," drawn by the common law. The distinction is a difficult one: indeed, it has sometimes been termed unworkable, but it nonetheless deeply rooted in the common law.

Both the civil and criminal law proceed on the basis that the law regulates active misconduct (misfeasance), not passive inaction (non-feasance). There is a duty not to cause harm to others by acts amounting to misconduct, but only in exceptional cases will there be a duty in law to help others. Liability will not generally be imposed for harm to others arising from complete inaction. Helping a stranger in peril is not one of these exceptional cases. Liability will not result if, like the priest and the Levite, there is not only indifference but complete inaction. On the the other hand, since legal immunity is linked to passive inaction, a good samaritan who intervenes assumes some risk of liability (though not a large one) when he crosses the threshhold and tries to assist.

The general absence of liability for non-feasance stems partly from historical notions of personal freedom and nineteenth century laissez-faire ideals. To oblige a person to act for the benefit of another was said to be tantamount to making him serve as a slave, albeit temporarily; "it was considered a virtue to mind one's own business and get along in the world without anyone else's help."[4] It was also defended on administrative grounds. First, there was the

problem of selection. Who on a crowded beach should be responsible for trying to save a drowning man? If someone stayed behind should he still be liable? If everyone went to do their duty, the drowning man might perish in the confusion. Then there was the problem of the duration and content of the duty. If one saves a man from starving to death, how long must one feed him in order to comply with the law? There was also the problem of definition: what exactly was a danger that would give rise to a duty to assist?

Different considerations may apply to criminal and civil liability but, as is often pointed out, the problems are really artificial and all can be resolved. As Linden reminds us, "The common law has long been accustomed to drawing lines and making distinctions. There is no reason why workable rules cannot be fashioned in order to make administration feasible."[5] In fact, major inroads have been made into the distinction between misfeasance and non-feasance and, in an increasing number of situations, passive inaction can give rise to civil or criminal liability. But notwithstanding frequent condemnation, the common law has not shifted its basic position so far as the good samaritan is concerned. As one jurist wrote at the turn of the century, "The law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good samaritan or not."[6] Only in Vermont and Minnesota has the basic common law rule been ousted by legislation.

In contrast, the civil law jurisdictions rely less on conscience and altruism and more on affirmative legal duties. Virtually every civil law jurisdiction (including Quebec) imposes a duty on the passerby to go to the aid of a stranger in distress if he can do so without undue risk to his own safety or that of others. The Levite and the priest would probably have been prosecuted in most parts of Europe since the duty to render assistance forms part of the criminal law. They might have been sent to prison for up to five years. In most civil law jurisdictions, they could have been also been sued for damages by the victim and his dependants. As a modern scholar has remarked, "The remnants of excessive individualism (that characterize the common law) are apt to evoke invidious comparison with affirmative duties of good neighbourliness in most countries outside the common law orbit."[7]

In Quebec, for constitutional reasons, the duty to render assistance is not a duty under criminal law. However, such a duty is imposed by both provincial statute and the Civil Code. Indeed, the duty to render assistance has a prominent place in Quebec law since the right to assistance in time or peril is enshrined in the Quebec *Charter of Human Rights and Freedoms*.

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1 R.v. Miller (1983) 3 All ER 978 at 980 (Lord Diplock).

2 Buch v. Amory Mfg Co (1897) 69 NH 257 at 260, 44 A 2d 809 at 810. See also Holmes, The Common Law (ed. Howe 1963) at 218-219.

3 Ames, Law and Morals (1908) 22 Harv L.R. 97 and Linden, Tort Liability for Criminal Non-Feasance (1966) 44 Can B. R. 30.

4 Linden, Rescuers and Good Samaritans (1971) 34 Mod L.R. 240 at 242.

5 Linden, supra note 3 at 31.

6 Ames, supra note 3 at 112.

7 Fleming, Law of Torts 6th ed 1983 at 138.

COMMON LAW JURISDICTIONS

CANADA

I. The Good Samaritan and the Common Law

1. The Duty to Render Assistance to Someone in Peril

1) The basic rule

Although the courts have praised the good samaritan, and declared that "to protect those who are not able to protect themselves is a duty which everyone owes to society," [1] they have stopped short of imposing on the ordinary citizen a general legal duty to render assistance to those in peril. He must not do anything concrete to harm the person in need of assistance, but is not legally bound to do anything at all to help.

As one judge observed in the leading Canadian case in this area,

> No principle is more deeply rooted in the common law that that there is no duty to take positive action in aid of another, no matter how helpless or perilous his position is.[2]

Writing in 1970, he went on,

> Despite the moral outrage of the text writers, it appears presently to be the law that one can, with immunity, smoke a cigarette on the beach while one's neighbour drowns and, without a word of warning, watch a child or a blind person walk into a certain danger.[3]

If there is no general duty to save another's life, still less is there any duty to save another's property. If a person sees a house burning down, he is under no legal obligation to lift a finger or call for assistance.

Whatever the moralist may say, the basic rule at common law is, therefore, that there is no general legal duty to render assistance to another, however great the peril to the victim and however small the risk to the rescuer.

2) Exceptions to the Basic Rule

The basic rule absolving the bystander from any common law obligation to render assistance to those in dire need is subject to certain qualifications. Some of these qualifications are purely judge-made: others have been introduced by statute. In some cases, the failure to render assistance may give rise to civil liability in tort. In other cases, it may carry penal or criminal consequences. Standing idly by in the face of an emergency may sometimes result in both civil and criminal liability.

a) Where a person is deemed to stand in a special relationship to the person in need of assistance

Although the law does not oblige the passerby to render assistance to a stranger there will be a duty to help if there exists a "special" relationship or, more particularly, a "protective" relationship between the parties. Special relationships give rise to positive duties which, if breached, may result in an action in tort at the suit of the victim or his heirs. This is the principal qualification to the general rule that there is no duty to act.

Such a relationship may be deemed to exist where one party derives an economic advantage from the other. Thus employers may be obligated to render assistance to employees injured in the course of their employment. Common carriers must assist a passenger in cases of accidents; innkeepers must aid their guests in time of fire.[4] Storekeepers may owe a duty of "protective care" to their customers and their customers' property. The duty to act is not confined to economic or commercial relationships. At common law, a parent cannot stand by and allow his children to starve or suffer for want of medical care. The occupant of premises owes a duty to protect his guests from unusual dangers of which he ought to be aware. The teacher may be under a common law obligation to go to the aid of his student. A jailor may be under a similar obligation to his prisoner. In the eyes of the law, there exists in these cases a relationship of reliance or dependance, a duty of protective care which, in times of emergency, is translated into a duty to take positive steps to render assistance.

It is difficult to catalogue with any real precision the full range of special relationships that give rise to a common law duty to render assistance.[5] The case law in Canada is very limited: most of the examples of special relationships noted above have never been tested in Canadian courts. They are either assumed to exist by the leading scholars or have been recognized in dicta by judges anxious to narrow the scope of a rule they regard as socially regressive. Nor are the categories of such relationships closed. In the *Ogopogo* case,[6] the Supreme Court of Canada was prepared to overrule an old case as an inconvenient anachronism and add to the list of special relationships the operator of a pleasure boat toward his guests.

It is likely that the range of special relationships will increase in the future, as it has in the United States. The history of the law of negligence is marked by the expansion of the duty of care. But while the exceptions recognized thus far have tempered the harshness of the basic rule, they have not yet reached the stage of engulfing the rule itself.[7]

b) Where the courts attach civil consequences to penal legislation

A number of statutes, both federal and provincial, contain provisions that impose in certain circumstances a duty to take positive steps to render assistance to those in need. Some apply only to certain special relationships. Others are more general in scope. A common feature of these statutes, which are examined in more detail in the next section of this chapter, is that they are all penal in nature. The consequences of violating a statutory duty to render assistance may be a fine or imprisonment, or both.

Occasionally, attempts are made by a plaintiff to recover damages from a defendant who has violated a statutory duty. The law in this area is rather vague, but it is probably accurate to state that in Canada the courts are reluctant to allow an action for civil redress to be founded on a breach of a penal statute if the statute is silent on the matter.[8] As a matter of statutory construction, a private right of action will rarely be implied.

At the same time, the courts in Canada are sometimes willing to view the statute as the legislative expression of social policy and then reinforce that policy by creating a new common law duty in tort. This was the technique employed by the Supreme Court in the *Ogopogo* case.[9]

One of the issues in that case was whether the person in charge of a pleasure boat owed a duty in tort to rescue his guest who had fallen overboard. Section 516(1) of the *Canada Shipping Act* [10] was cited to the court to show that a duty to rescue was imposed by statute and that a breach of that duty was punishable by a fine. The Act was silent about whether any civil consequences could flow from a violation of this penal provision. Laskin J. declined to hold as a matter of interpretation that a breach of the provision entailed civil liability in addition to the penalty specified in the Act. Nevertheless, as a declaration of legislative policy the existence of the provision fortified the conclusion that such a duty should also be imposed at common law for the purpose of civil liability. A new special relationship was thus added to the list of those previously recognized. Henceforth, the failure by a person in charge of a vessel to go to the aid of a person who had fallen overboard might not only amount to a crime: it could also result in civil liability for the tort of negligence.[11]

Although the technique of using penal legislation as a means to create new duties at common law is well-established, it is not easy to predict when it will be employed by the courts. Hitherto, the Canadian courts have been much less receptive to its use than their American counterparts. There are instances in the United States where the courts have reinforced penal legislation aimed at hit-and-run drivers by imposing a civil duty to stop and render assistance to the victim. If the victim suffered because the driver did nothing to help, he can recover damages even if the victim, and not the driver, were responsible for causing the accident.[12] In contrast, the Canadian courts have yet to use the equivalent legislation in this way. If a motorist involved in a accident fails to stop, remain at the scene and render assistance, he may be liable to a penalty for having violated the Criminal Code or a provincial statute. But the driver will not be civilly responsible to the victim for failing to render assistance - unless it is shown that the accident was caused by his negligence.

c) Where the person is himself responsible for creating the situation that places another in danger

Those who create situations posing dangers to others are bound to take steps to neutralize the risks and minimize harm.

If a person negligently creates a situation that places another in danger, he cannot assume the uninterested stance of the casual bystander. Having created the danger, he is bound in law to render assistance. Thus the motorist who is negligent and causes an accident involving injuries to another will be liable in tort if he fails to render assistance, in addition to any criminal liability to which he may also be subject. He is bound to take steps to see that the victim receives medical attention. He must remove any hazards the debris resulting from the accident might pose to others. A person who negligently sets fire to his neighbour's house cannot stand by and watch it burn down. He has a duty to call the fire brigade. In short, such persons are under a duty to take all reasonable steps to minimize both the danger and the damage they have caused.

However, there is a world of difference between a rule that requires a person to mitigate the harmful consequences of his own conduct, wrongful or otherwise, and one requiring a bystander to step in and help. This exception to the general rule is more apparent than real. [13]

d) Where a person is deemed to have assumed a legal duty to act

In some circumstances, a person will be deemed by the law to have assumed a duty to render assistance. The lifeguard cannot stand idly by while the swimmer drowns - at least not if he is on duty. The same applies to firemen and policemen and certain public officials. But these, too, are not genuine exceptions to the ordinary rule. These individuals are not good samaritans: they are merely carrying out their duties spelled out in their contracts of employment or imposed by statute. If they neglect their duties they will be accountable to their employer and they (and their employers) may also be liable in tort to the victim.

A better example would be the circumstances in the parable of the good samaritan. Having taken the victim into his charge he could not after a certain point abandon him completely. The legal problem is to determine at exactly what point an expression of interest in the plight of another will be transformed into a duty to provide assistance. There is little authority on point and none, it would appear, in Canadian law.[14]

2. The Rights of the Good Samaritan

It sometimes happens that a good samaritan makes a valiant attempt to save someone but gets killed or injured in the process. In other cases, he may escape serious harm but find himself out of pocket as a result of rendering assistance, whether it be the cost of replacing torn clothing, expenditures incurred on behalf of the person in peril, or losses suffered as a result of interrupting his scheduled activities.

The good samaritan has no legal obligation to intervene and render assistance, but if he does so, what are his rights and those of his family, and against whom do they lie?

At one time, the common law did not look kindly on any claims for compensation by good samaritans. In keeping with the logic that allows the ordinary person to walk away from an emergency and ignore cries for help, the attitude of the law was that the good samaritan who chose to intervene had only himself to blame for his injuries or losses. In the eyes of his fellow men he was a hero, gallant and public-spirited. In the eyes of the law, he was an officious volunteer, whether unlucky or misguided. Since he was under no legal duty to act, he had only himself to blame for his own misfortune. He had voluntarily assumed the risk of injury and loss. For good measure, the courts sometimes added that there was no causal link between the original breach of duty creating the peril and the injuries suffered by the rescuer. Thus, in an early case, the family of a man who was killed when he leaped in front of a train in a vain effort to save another, was not entitled to be compensated.[15]

However, the attitude of the common law has changed quite radically. Led first by the Manitoba Court of Appeal and later by the leading cases in England and the United States, the courts now go out of their way to compensate the rescuer. As Lord Denning said in an English case that has been quoted throughout the Commonwealth: "Whosoever comes to the rescue, the law should see that he does not suffer for it."[16] Nevertheless, this does not mean that the good samaritan has a right to recover in every case. And when he has such a right, it does not always follow that he will be entitled to be indemnified for all his losses and expenses. As the common law stands at present, the right of the good samaritan to recover compensation for personal injuries or damage to property will turn principally on whether the emergency prompting his intervention was caused by someone else's negligence or fault.

1) Where a good samaritan suffers injuries or losses while responding to an emergency caused by someone's negligence.

If the danger resulted from the victim's own negligence, the victim would be liable to compensate his rescuer.[17] If the victim's plight is not of his own making but due to the negligence of a third party, the rescuer (as well as the victim) is entitled to recover damages in tort from the third party. Negligence imperilling the person rescued is also negligence towards his rescuer.[18] In the words of Lord Denning,

> If a person by his fault creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively, out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can claim damages from the one whose fault has been the cause of it.[19]

While almost all the cases deal with the rights of the good samaritan who intervenes to help a person in distress, it is now established law that the same principles apply in cases where the injuries and losses are suffered in the course of attempting to rescue another's property. [20] The common prerequisite is that the danger prompting the good samaritan to act must have arisen because of someone's negligence.

To encourage acts of altruism and heroism in times of emergency the courts have relaxed the ordinary requirements of the tort of negligence. As one commentator has observed, "If normally the law does not compel one to go to the aid of an imperilled neighbour, at least it should encourage him to do so."[21] In conceptual terms, the recourse of the rescuer is still founded on the tort of negligence, but the constituent elements of that tort - duty, fault, foreseeability and causation - have been modified or diluted or stretched to serve the underlying policy of encouraging unsolicited aid. Some commentators consider that the rights of the rescuer have evolved to the point that they are now *sui generis*.[22]

As Lord Denning points out, the good samaritan will not be viewed by the law as an officious volunteer and denied all relief unless his actions can be characterized as "wanton interference." If a good samaritan suffers injuries as a result of his own carelessness in the course of attempting a rescue, he will not be found to have been contributorily negligent unless his conduct in the circumstances was "rash," "foolhardy" or "needlessly reckless." These standards are far more liberal than those imposed on the party whose negligence was responsible for creating the peril in the first place. They are also far lower than the standard demanded of a plaintiff in an ordinary negligence action.

Nevertheless, the rights of the good samaritan who goes to the rescue of someone in peril are still subject to certain important limits. In the first place, the right of the rescuer to recover compensation for his injuries or losses is still dependent upon proof of fault or culpability by another. If the emergency cannot be attributed in law to anyone's fault or carelessness, the good samaritan will have no one to sue and thus no means of recovery in tort. The case of *Horsley v MacLaren* (the *Ogopogo* case) offers a controversial example of this important limitation.

In that case, a guest (Matthews) on a power boat (the Ogopogo) owned by the defendant (MacLaren) fell overboard. The owner tried to rescue Matthews by manoeuvring the boat toward him, but because he was clumsy and used the wrong procedures, the process took longer than it should have done and was ultimately unsuccessful. In the heat of this crisis, the plaintiff Horsley (another guest) jumped into the water to try to save Matthews. Both men perished in the chilly waters of Lake Ontario.

The defendant, MacLaren, the court held, owed a legal duty to take positive steps to rescue Matthews. There was in law a "special relationship" between the parties: the operator of a boat owed a duty of protective care toward his passengers. The defendant would be liable to Matthews (or his dependants) if his conduct in the circumstances amounted to negligence.

Horsley, on the other hand, was a good samaritan who owed no duty to rescue Matthews. He could not have sued Matthews merely for falling overboard. His only recourse was against MacLaren and his right to recover depended on whether MacLaren had been negligent toward Matthews.

It was generally accepted that MacLaren was in no way responsible for Matthews having fallen overboard.[24] The crux of the case therefore turned on whether there had been any negligence in the manner of rescue. The majority of the Supreme Court agreed with two members of the Ontario Court of Appeal that while MacLaren had not carried out the rescue operation with textbook perfection, his conduct did not amount to negligence.[25] He was not liable to Matthews so he could not be liable to Horsley. Laskin, J (joined by Hall, J) dissented: in his view, the trial judge was right. MacLaren had been negligent in the way he had handled his boat. His negligence had aggravated the danger to Matthews and it was foreseeable in these circumstances that someone like Horsley would attempt to rescue him.[26]

Secondly, the right of a good samaritan to be compensated by a negligent person is not absolute. Although it is unusual for the courts to deny a remedy to the rescuer on the ground that the likelihood of someone attempting a rescue was unforeseeable in law, such cases do occasionally occur. The majority of the Court of Appeal in the Ogopogo case would have dismissed Horsley's claim on this ground, even had they found that MacLaren was negligent. Similarly, it may not always be possible to prove that the negligent act was the proximate cause of the damage suffered.[27]

Thirdly, there is some lingering uncertainty about the extent of recovery possible under the common law tort of negligence. The recovery of damages for personal injuries or damage to tangible property or consequential losses poses few problems. The only issues likely to arise in such cases are those of causation and remoteness. It is less clear whether a good samaritan can recover damages if he only suffers what the law terms "pure economic loss" - losses unrelated to any physical damage or personal injuries. An example would be where the good samaritan is not injured and his only loss is a (costly) missed business appointment.

The common law has traditionally been reluctant to recognize purely pecuniary losses as a legitimate head of damages in tort. In recent years, the courts have relaxed the traditional barriers and there are now many cases where such damages have been awarded.[28] Given the attitude of the courts toward suits by good samaritans, it seems likely that they will benefit from any exceptions to the general rule. However, the law in this area, and thus the good samaritan's rights, are unclear.

2) Where there is no proof of negligence

Without proof of negligence, the good samaritan cannot rely on the law of tort to recover compensation for losses or injuries sustained as a result of rendering assistance. If the policy of the law is to encourage the individual to be a good samaritan, it is important to ensure that he will not be left out of pocket, but if he cannot sue in tort his alternative avenues for relief are few in number and narrow in scope.

If a contract for services had been made between the parties, there would be little difficulty in establishing his right to compensation. But good samaritans do not generally negotiate terms with a person in peril before taking steps to help.[29] In the absence of a contract, any services rendered by the good samaritan would be considered gratuitous. Any out-of-pocket expenses would be considered in law as a gift. Any injuries or losses suffered would not be subject to compensation because the good samaritan would be deemed in law to be an officious volunteer who had assumed all risks and all costs. Any compensation he might subsequently receive would be *ex gratia* in nature and depend upon the generosity and gratitude of the person rescued.

The common law has traditionally denied relief to those who officiously intervene in the affairs of others, even when the intervention is clearly altruistic and beneficial. Unlike civil law jurisdictions, the common law never developed a doctrine comparable to the Roman law concept of *negotiorum gestio* which recognized that a person had a right to be compensated for voluntarily protecting the interests of someone who was incapacitated. However, there is a narrow doctrine in the law of restitution called "necessitous intervention" that may entitle the good samaritan to recover some compensation from the person he has helped. Under this ill-defined doctrine, a good samaritan cannot recover damages for personal injuries or for losses he may have suffered but, in some circumstances, he may be able to obtain reimbursement of any expenditures made for the other's benefit. [30]

If the good samaritan intervenes to save someone's life, it is likely that he can recover expenditures made on that other's behalf or for his benefit. If the good samaritan happens to be a doctor and provides professional services, he may also be entitled to claim remuneration unless the services were intended to be gratuitous.[31]

If the good samaritan acts to preserve another's property it is doubtful whether he is entitled to any relief at all. According to the leading case decided by the English Court of Appeal in 1890: "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not ... create any obligation to repay the expenditure." [32]

There are a few exceptions to the general principle scattered in the law, notably in the field of maritime law. For example, one who salvages a cargo in danger of being lost at sea is entitled to claim compensation for the cost from the owner. The principle itself has been been questioned and criticized as outmoded. But it has yet to be overruled anywhere in the Commonwealth.

3. The Risks of Acting as a Good Samaritan

As has already been seen, a bystander has no legal duty to go to the aid of another. If he chooses to act as a good samaritan, he may be entitled to be compensated for injuries or losses he may have sustained as a result of his efforts. But as has been noted, his right to compensation at common law is not absolute in nature or comprehensive in scope. And if he bungles the attempted rescue, it is possible that he may be held liable to the person he tried to help.

In terms of legal theory, the bystander is safe so long as he does nothing. But as soon as he does something to help, he loses his immunity for failing to act (non-feasance) and henceforth will be liable in tort if his conduct does not meet the standards of competence and care imposed by the law of tort (misfeasance). As one commentator has stated:

> The common law does not protect every single rescuer, no matter how foolish his attempt: there must be some reasonably perceived danger to a person or goods and the conduct of the rescuer must be reasonable in the circumstances.[33]

He may also be held liable to third parties if his efforts cause injury or damage to their person or property. Volunteering to render assistance may thus put at risk more than one's physical safety.

1) The risk of liability to the person in distress

The risk of being "mulcted in damages" by the person one has tried to help for an error of judgment is sometimes cited as a serious deterrent to acting as a good samaritan.[34] However, in Canada (and most Commonwealth countries), that risk is more theoretical then real. for the courts have lowered the ordinary standards of care in favour of the good samaritan, reflecting a policy of encouraging individuals to volunteer their help and recognizing that different norms of conduct should sometimes apply in times of emergency.

As the common law stands at present, a good samaritan will only be liable to the victim if his conduct was both unreasonable in the circumstances and actually aggravated the plight of the victim. In that event, the good samaritan will be accountable for any additional harm his negligent conduct caused to the victim's person or property. As the Ontario Court of Appeal stated in the *Ogopogo* case:

> Where a person gratuitously and without any duty to do so undertakes to confer a benefit upon or go to the aid of another, he incurs no liability unless what he does worsens the condition of the other.[35]

Secondly, a good samaritan who responds to an emergency and begins to render assistance is free to change his mind and abruptly retreat from the scene. The classic (hypothetical) case is that of the bystander who sees a man drowning, dives to his rescue but turns back before reaching him. The courts in Canada have taken the view that one who was under no legal duty to render assistance in the first place is free to abandon the person in need at any time and for any reason so long as he does nothing concrete to worsen his situation. This rule was recently reaffirmed by the Ontario Court of Appeal in the *Ogopogo* case:

> If a person embarks on a rescue, and does not carry it through, he is not under any liability to the person to whose aid he has come so long as the discontinuance of his efforts did not leave the other in a worse condition than when he took charge.[36]

The attitude of the courts is consistent with the logic that allows the bystander to stand by and watch a child drown even if the only risk in saving him is getting his shoes wet. Not surprisingly, the rule has been criticized as being too generous to the fickle, and its bald formulation by the Ontario Court of Appeal probably requires some qualification.[37] The right to withdraw at any time and for any reason must be subject to some limits. The rule and its limits have yet to be tested in the courts but it is doubtful that they would allow a perverse rescuer to turn back in mid-stream out of pique or whim and yet remain completely free from liability if the victim drowns.[38] There comes a point when someone who is under no duty to intervene, but does so anyway, will be deemed to have voluntarily assumed a legal duty to act. And once that line is crossed, he becomes bound to meet the same standard of care as someone who was under a legal duty to render assistance in the first place, or risk being found liable in negligence.[39]

While one can invent hypothetical situations in which a good samaritan might be held liable for having bungled or aborted a rescue attempt there would appear to be no reported cases in Canada in which a good samaritan has been sued by the person he tried to help, let alone held liable. This was the finding of the Manitoba Law Reform Commission in 1973 and one of the major reasons for recommending that the law not be changed. There was, they concluded, no need for legislation to protect the good samaritan from liability.[40] The same conclusion had been reached by the Ontario Law Reform Commission in 1971. In both cases, that position

followed the recommendations of the medical profession and their insurance company, the Canadian Medical Protective Association. A further search has turned up only one rather curious case.[41]

Nevertheless, the risk of being sued for malpractice [42] is apparently perceived by some physicians and other health professionals as a serious one, although a survey of 10,000 Ontario physicians in 1971 showed that over 90 per cent of doctors would stop and render emergency assistance at the scene of an accident. [43] As will be seen, some provinces have responded to the medical profession's fear of malpractice suits by enacting legislation conferring immunity from suit on doctors and others who provide emergency medical assistance at the scene of an accident.

2) Liability of the Good Samaritan to Third Parties

The good samaritan probably runs a greater legal risk of being held liable to a third party than to the person he has tried to help if he causes personal injury or damage to property in the course of rendering assistance. However, the common law does make some concessions to the exigencies of the situation and the difficult choices that often have to be made in times of emergency.

The old common law defence of necessity will protect the good samaritan from liability for trespass if, without permission, he enters another's land or uses another's goods if that is reasonable and necessary to save life or preserve property in imminent peril. He can break into a neighbour's garage and seize an axe if that is necessary to rescue a stranger trapped inside a burning car.[44]

It is doubtful whether the defence of necessity applies to excuse personal injury, as for example where a good samaritan knocks a person down while rushing to the aid of another in peril. He may be protected from liability in negligence if the injury was minor and it is shown that his conduct was not unreasonable in the circumstances. But it will not excuse serious personal injury.[45] Whatever may be his potential liability in theory, the absence of reported cases involving good samaritans and third parties suggests that the practical risk of the good samaritan being sued is insignificant.

II. Statutory Modifications to the Common Law

A number of statutes, both federal and provincial, have modified the common law rules concerning the duty of the citizen to render assistance in times of an emergency. Many of these statutes have chipped away at the basic starting point of the common law by imposing a legal duty to act in certain prescribed situations, instead of leaving it to the conscience of the volunteer. Some statutes do no more than this: others, particularly the emergency powers statutes, go on to confer some immunity from suit upon those they require to render assistance. Another group of statutes impose no duty to act but seek instead to encourage the good samaritan to volunteer his services by alleviating some of the perceived risks of potential legal suits which might otherwise cause him to hesitate.

A few statutes reinforce or modify the rights of the good samaritan to recover compensation for injuries or other losses incurred while rendering assistance. The principal exceptions are those that establish criminal injuries compensation boards, provincial tribunals that make *ex gratia* awards to the victims of criminal assaults, including those injured while trying to prevent harm to others. And no common law province has yet established a scheme to reward good samaritans.

The Law Reform Commission of Canada has long advocated that everyone should be obligated by the criminal law to render assistance in an emergency. [46] It recently recommended

that the Criminal Code should impose a general duty of "easy rescue" on everyone who sees another in immediate danger of death or serious harm. To refrain from taking reasonable steps to render assistance, where he could do so without risk of serious harm to himself or another person, should be a criminal offence unless he has some valid reason for not acting.[47]

1. Statutes Imposing A Duty To Render Assistance

A number of statutes, both federal and provincial, contain provisions that impose a duty to take positive action to help others in need. Some do so directly but apply only to those standing in a special relationship. Examples are the provisions in the Criminal Code that spell out the basic obligations of succour and support owed to one's dependants. Parents, married persons and guardians are bound to provide the necessaries of life to their children, spouses and wards.[48] Similar obligations can be found in the child welfare legislation and family law statutes in many provinces.[49] The owner of an animal is required by the Criminal Code to provide it with adequate food and shelter.[50]

Others apply more generally. Section 202 of the Criminal Code defines "criminal negligence" to include "omitting to do anything that it is his duty to do" if that shows "wanton or reckless disregard for the lives or safety of other persons." The duty referred to may stem from federal or provincial legislation, as well as the common law.

The *Canada Shipping Act* requires the master of a vessel to take steps to rescue anyone in danger of being lost at sea. It will be noted that the duty to render assistance is imposed on the captain, not on members of the crew generally.[51] In similar vein are the statutes that require motorists involved in road accidents to stop, remain at the scene and render assistance. The duty is imposed by section 233(c) of the Criminal Code and supplemented by similar provisions in virtually every provincial highway traffic Act.[52]

In its original form, the provision in the Criminal Code only required the motorist to stop and remain at the scene of the accident. The penalty may have deterred a person from trying to evade liability for the accident but it did little to encourage the individual to render assistance to anyone injured. As already noted, such a duty would fall only on the party at fault. In consequence, the Criminal Code was amended to expressly require the motorist to "offer assistance," and similar amendments were made in most of the provinces. Even in its present form, however, section 233(2) of the Criminal Code is quite limited: the obligation to render assistance is imposed only on the person in charge of the vehicle. There is no similar obligation on the passengers or any passersby.

A few statutes impose a duty to render assistance when directed to do so by an authorized public official. Perhaps the best known example is the provision in section 118 of the Criminal Code empowering a police officer to require any citizen to assist him in making an arrest or keeping the peace.[53]

Similar provisions can be found in provincial legislation. For example, the *Ontario Forest Fires Prevention Act* empowers a fire warden to require any person to assist him in extinguishing a forest fire.[54] In most cases, these statutes fall more conveniently into the next category, for the duty to render assistance is usually accompanied by statutory protection against civil liability for acts or omissions in the execution of that duty.

2. Statutes that Impose a Duty to Render Assistance and, in addition, Confer Protection from Suit

In some provinces,[55] individuals may be required in times of emergency to provide essential services to those in need. The power to require such assistance arises under provincial

emergency powers legislation. The duty to to do so will arise if and when the requisite emergency powers are invoked by the appropriate provincial authorities, a process that may involve a Cabinet order and depend upon the meaning of "emergency" in the particular statute.

In some of these statutes, the power to require others to render assistance is both broad and explicit. The New Brunswick Act empowers the responsible Minister "to authorize or require any qualified person to render aid of such type as that person may be qualified to provide.[56] In Newfoundland, the Minister may be authorized to "conscript" any person to assist in an emergency,[57] and in Prince Edward Island the Minister is empowered to do "anything in connection with...the assistance of any person in the doing of any work or the performance of any service." [58] Similar provisions exist in the emergency powers legislation of Nova Scotia [59] and British Columbia.[60] In other provinces such as Saskatchewan, the power probably resides in the general enabling provisions of the emergency powers legislation. It is an offence punishable by fine, and possibly imprisonment, to ignore these exceptional and temporary obligations.

A common feature of these Acts is a companion provision relieving the individual from possible civil liability arising from acts or omissions in the performance of his emergency duties. The language varies but the overall effect is the same: a person who acts in good faith will not be liable for any damage or injuries caused to others in the execution of his duties. In some provinces, this immunity from suit is subject to the proviso that the individual's conduct was reasonable in the circumstances.[61]

The federal government will have similar powers during "Public Welfare Emergencies" when the new *Emergencies Act* [62] is passed. Following a declaration of such emergency, the Governor-in-Council may make orders or regulations requiring any person to render such essential services as directed. For constitutional reasons, the federal measure does not contain a general provision conferring immunity from civil liability. However, it does protect a "servant or agent of the Crown" from any action for damages arising from the execution in good faith of emergency duties and responsibilities.[63] It also authorizes the Minister to compensate anyone who suffers injury, loss or damage as a result of actions taken pursuant to emergency powers.[64] The power of a public official to demand emergency assistance from any person arises under other federal and provincial statutes. For example, under the federal *Transportation of Dangerous Goods Act* [65] an inspector is entitled to request any person he considers qualified, to assist him in dealing with a spill of dangerous goods[66] and the person requested is bound to comply. However, he will not be liable, either criminally or civilly, for any act or omission "unless it is shown that he did not act reasonably in the circumstances."[67] Comparable provisions exist in some of the corresponding provincial legislation. [68]

3. Statutes that Impose No Duty to Render Assistance but Offer Legal Protection to the Good Samaritan

Five provinces and the two territories have enacted laws designed to protect the good samaritan. They do not attempt to force a person to go to the aid of a stranger in peril: the ultimate decision is left to the conscience of the individual. Instead, they insulate the good samaritan from the risk of liability toward the person he has tried to help. As will be seen, this type of statutory immunity is common in the United States and it is clear that the Canadian legislation has followed the U.S. models.

Like the U.S. legislation, there is little uniformity among the Canadian laws protecting the good samaritan. The most comprehensive of these laws - none of which runs to more than four sections - is Nova Scotia's *Volunteer Services Act.* [69] It applies to anyone who voluntarily and gratuitously renders assistance to a person who is injured as a result of an accident or emergency,

or who tries to protect another's property from danger. [70] It effectively renders the good samaritan immune from any suit arising out of his intervention unless there is evidence of gross negligence.

The other enactments are all narrower in scope. The *Good Samaritan Act* in British Columbia [71] protects all those who render emergency medical aid without charge at the scene of an accident, unless they were grossly negligent. But it offers no protection to the good samaritan who acted in order to save property. The corresponding legislation in Newfoundland and Alberta covers the same ground as the British Columbia statute using a slightly different form. There is a specific provision for physicians and health professionals who render emergency medical services elsewhere than in hospital or place with adequate medical facilities, and another for everyone else. But the net result is the same: no liability in tort for anything less than gross negligence. [72] The Saskatchewan Act and the Ordinances of the Yukon and the Northwest Territories share one slight difference: protection from liability is not conditional upon the services being gratuitous. [73]

The recurring question is whether these statutes modify in any way the common law standard and, if not, whether they serve any real purpose. Most commentators consider that the legislation adds little if anything to protection offered by the existing common law. In a curious provision, the Nova Scotia Act seems anxious to confirm this. It provides in section 3 that "This Act is declaratory and shall be deemed to be the common law of the Province as it always has been and as it is." They may set to rest any doubts about the common law standards, but since there are no cases there is really no live controversy. They may provide some psychological security to physicians who might otherwise think twice about stopping to help. But if the results of the 1971 survey of Ontario doctors [74] is representative of the attitude of physicians generally, it would seem that physicians in Canada do not need any further legal incentive to encourage them to meet their ethical obligations in times of emergency.[75] On the other hand, it is possible that the 1971 survey is out of date and that the threat of malpractice suits has increased, although there is little evidence in the law reports of suits against doctors acting as good samaritans.

4. Statutes that Establish Compensation Schemes for Good Samaritans

It was earlier noted that a good samaritan might find himself injured and out of pocket as a result of going to the aid of someone in peril in circumstances where there would be no one from whom he could claim compensation under the common law. The obvious case is where he rescues someone from a serious peril created by natural causes, such as floods or earthquakes. Another example might be where he rescues a guest on a pleasure boat who has fallen overboard and almost drowns. It may not always be just to saddle the person who benefitted with the total cost of indemnifying the good samaritan. Even if it were, there is always the attendant uncertainty whether the good samaritan will actually get paid. It is sometimes suggested, therefore, that in the interests of fairness and encouraging altruistic behaviour there should be government-financed plans to compensate good samaritans.[76]

No common law province has yet established a fund to compensate good samaritans for injuries or losses sustained in such circumstances. However, every province except Prince Edward Island does have a scheme to compensate the victims of criminal injuries which would cover good samaritans hurt in this way. All the schemes are broadly similar in that they cover injuries caused by criminal conduct, the range of which varies slightly among provincial Acts, or injuries suffered while helping a police officer. The *Ontario Compensation for Victims of Crime Act* also includes injuries suffered while trying to stop someone from committing an offence against a stranger. [77] Awards, which are discretionary, range up to a maximum of $25,000 in Ontario and a number of dependants qualify as claimants.

5. Statutes Establishing Schemes to Reward Good Samaritans

The arguments advanced for establishing a compensation scheme for good samaritans are also support the creation of a fund to reward those who risked their own safety to rescue others. No such scheme exists in the common law province although, as will be seen, such a fund has been created by statute in Quebec.

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1 Linden, Canadian Law of Tort 3d ed 1982 at 301.

2 Horsley v MacLaren (The Ogopogo case) [1970] 2 OR 487 at 499 (CA) (Jessup JA).

3 Id.

4 They may also have a duty to protect their guests from themselves, as well as from others when they are drunk: Jordan House Ltd v Menow [1974] SCR 239.

5 See generally Fleming, Law of Torts 6th ed 1982 at 139.

6 Vanvalkenberg v Northern Navigation Co (1913) 30 OLR 142 (CA).

7 Cf Linden, supra note 1 at 315.

8 R v Sask Wheat Pool (1983) 23 CCLT 121 (SCC).

9 Supra note 2.

10 RSC 1970 c S-9.

11 Horsley v MacLaren (1971) 22 DLR 3d 545 at 559 (SCC); see generally Alexander, One Rescuer's Obligation to Another: the Ogopogo lands in the Supreme Court (1972) 22 UTLJ 99.

12 Eg. Brooks v E J Willig Transport Co (1953) 40 Cal App 2d 669, 229 P 2d 802, Prosser, Law of Torts 4th ed 1971 at 808-809.

13 There is some authority to the effect that a duty to alleviate the risk of harm will arise even where the danger was caused by conduct that was entirely blameless. See Oke v Carra (1963) 38 DLR 2d 188; Racine v CNR [1923] 2 DLR 572; and Fleming, supra note 6 at 139.

14 See Zelenko v Gimbel Bros 287 NYS 134 (1936)(Plaintiff fell ill in Defendant's store. Defendant's employee moved her into a back room and left her there unattended for more than six hours. Plaintiff subsequently died. Even without the possible duty of care that might have stemmed from the shopkeeper-customer relationship, the court was prepared to find that the defendant has assumed a duty of care by moving her. See also Alexander, supra note 11 at 104.

15 Kimball v Butler (1910) 15 DLR 221 (Man CA).

16 [1960] 2 QB 650 at 669 (CA).

17 The old rule in Dupuis v New Regina Trading Co [1943] 4 DLR 275 was reversed by the Supreme Court in Horsley v MacLaren, supra note 11 at 559. See also Chapman v Hearse (1961) 106 CLR 112 (HCA) and Harrison v British Railways [1981] 3 All ER 679.

18 Fleming, supra note 5 at 156.

19 Videan v British Transport Commission, supra note 16 at 669.

20 Connel v Prescott (1892) 2 OAR 49, aff'd (1893) 22 SCR 147; Hutterley v Imperial Oil (1956) 3 DLR 2d 719.

21 Alexander, supra note 8 at 106.

22 Linden, Rescuers and Good Samaritans (1971) 34 Mod L.R. 241. See Urbanski v Patel (1978) 84 DLR 3d 650 (Man QB) but of Carothers v Slobodian (1973) 36 DLR 3d 597 (Sask CA).

24 There was some question whether Matthews was partly responsible for his own misfortune for there was evidence that all parties had been drinking. But this was discounted by all the judges except Laskin and Hall J J..

25 The other judge, Jessup JA agreed with the finding of the trial judge that MacLaren had "failed to exercise the reasonable care of an ordinary, prudent, reasonable power boat operator," supra note 2 at 498-499.

26 Supra note 11 at 466-467.

27 Supra note 2 at 496; see also Clyke v Clyke, NSCA, February 10, 1988 (unreported) and the English case of Crossley v Rawlinson [1982] 1 WLR 349 (CA)

28 See Feldthusen, Economic Negligence (1984).

29 As a matter of legal theory, there may be room for the courts to "find" that emergency services were supplied by a good samaritan on the basis of an implied contract. The cry for help is surely a request for assistance and it is a short step to constructing from that request an implied contractual promise to indemnify anyone who responds by providing relief. The requisite elements exist independently in the case law, but they have yet to be fashioned by the courts into a means of relief for the good samaritan. See Lampleigh v Braithwait (1615) Hob 105; cf Bennett v Puna [1956] NZLR 629.

30 Goff and Jones, Law of Restitution 2d ed 1978 at 267 ff; Klippert, Unjust Enrichment (1983) at 110 ff.

31 Matheson v Smiley [1932] 2 DLR 782 (Ont CA).

32 Falke v Scottish Imperial Ins Co (1886) 34 Ch D 234 at 240 (CA).

33 Linden supra note 22 at 256.

34 See eg Jessup JA in Horsley v MacLaren, supra note 2 at 502.

35 Jessup JA, supra note 2 at 500.

36 Supra note 2 at 495 (Schroeder JA); 500-501 (Jessup JA). But in the Supreme Court Laskin J was sceptical and preferred to leave the issue open: supra note 11 at 559.

37 See Fleming, supra note 5 at 138.

38 See Prosser, supra note 12 at 348, and Alexander, supra note 11 at 104-105 who discuss where the line might be drawn.

39 It is possible that such conduct might violate section 202 of the Criminal Code.

40 Manitoba Law Reform Commission, Report on the Advisability of a Good Samaritan Law in Manitoba (1973).

41 Sherrin v Hagerty (1953) OWN 962 (Co Ct) where a would-be samaritan was sued by (and found liable to) the person he had helped. But the report of this county court decision raises questions about the motives of the rescuer and the circumstances of the rescue itself. The plaintiffs owned a cottage on the shores of Lake Ontario. The defendant, who lived about a mile away, noticed that recent storms had eroded the shoreline and that the cottage was in danger of being washed away. He informed the real estate agent who looked after the cottage for the absentee owners. The real estate agent sent a telegram to the owners suggesting that the cottage be moved back. When no reply was received, the defendant took it upon himself to move the cottage and in doing so did some damage. The defendant sent a bill for moving costs and the owner sued the defendant in trespass. The fact that the owner knew about the danger to his cottage and chose to do nothing, appears to have been the crucial factor in this case. The defendant had entered onto the owners' land against their will, instead of with the implied consent that would be present in a true rescue case. But although the defendant was found liable in trespass he was ordered to pay only nominal damages of $1. As the judge said (at 956):

> From a purely equitable standpoint...one would have thought that the plaintiff would have been well-advised to review the circumstances very carefully before bringing an action against the defendant in view of the fact that the trespass actually saved the cottage from going over the bank.

42 The "unhappy" anomaly of the common law that you may be 'damned if you do' but cannot be 'if you don't' has somehow found its way into the consciousness of the North American physician." Gray and Sharpe, Doctors Samaritans and the Accident Victim (1973) 11 Osgoode Hall L.J. 1 at 5.

43 Id.

44 The doctrine seems to have two sides; public - the right of a person to pull down a burning house to stop the spread of fire threatening the entire city, see Saltpetre's case (1606) 12 Co Rep 12; and private - where the act is done for limited private purposes, see Cope v Sharpe [1912] 1 KB 496

and Fleming, supra note 5 at 87 ff.

45 Fleming, ibid.

46 See e.g. Law Reform Commission, Working Paper 26 (1980) Medical Treatment and the Criminal Law, at 57; Working Paper 46 (1985) Omissions, Negligence and Endangering, at 16-20.

47 Law Reform Commission of Canada, Report #30 (1986), Recodifying the Criminal Law, Vol 1 clause 10(2) at 64.

48 Crim. Code s. 197; there are analogous provisions imposing similar obligations on a master toward his apprentice or servants in s. 201.

49 See e.g. Alta: *Child Welfare Act* RSA 1980 c-C-8, s. 35(1).

50 Crim. Code s 402(1)(c) - and the wilful failure to do so is an offence.

51 *Canada Shipping Act* RSC 1970, c S-9 s. 516.

52 Eg RSO 1980 c 198 s. 174(1).

53 Although it does not always seem to work. According to a report in *The Ottawa Citizen* of August 4, 1987 (D 15) under the heading "Crowd refuses to help policemen during assault," a crowd of 300 in Sault Ste. Marie refused to respond to requests for assistance from two policemen who were assaulted while making a liquor seizure.

54 RSO 1980 c 173 s.7 - any fit person between the ages of 18 to 60, except those providing essential services.

55 But not all, e.g. Ontario.

56 *Emergency Measures Act* RSNB 1979 c E-7.1 s. 13c.

57 *Emergency Measures Act* RSN 1970 ss. 9, 12.

58 *Emergency Measures Act* RSPEI 1974 c E-5 s.8(2)(k).

59 *Emergency Measures Act* RSNS 1967 c 87 ss.9(1); (2)(k).

60 *Emergency Programme Act* RSBC 1979 c 106 s.5(i).

61 Nfld.: s. 19(4); Man.: s. 14(3); N.B.: s.22(1); P.E.I. s. 9; N.S.: s. 11; B.C.: s. 12.

62 Bill C-77, First Reading June 27, 1987.

63 Id. section 45.

64 Id. section 46.

65 SC 1980 c 36.

66 Id. S. 17(3).

67 S. 17(4); but see also s. 18(5).

68 See e.g., B.C. *Transportation of Dangerous Goods Act* SBC 1985 c 17, where an inspector has the power to requisition help from any person (s 21). It is an offence to refuse, but persons rendering assistance are shielded from civil liability. In Manitoba there are provisions to the same effect in the *Dangerous Goods Handling and Transportation Act* SM 1984 c D-12 s 30.

69 SNS 1977, c 20.

70 Id. ss. 3, 4.

71 RSBC 1984, c 155.

72 *Emergency Medical Aid Act* SN 1971 no. 15; *Emergency Medical Aid Act* RSA 1986 c E-9.

73 Sask: *Emergency Medical Aid Act* RSS 1983 c E-8; NWT: *Emergency Medical Aid Ordinance* 1976 c 3, Yukon: *Emergency Medical Aid Ordinance* 1976 (3rd) c 1.

74 Supra note 42.

75 CMA Code of Ethics, art 13: An ethical physician will render all assistance in his power to any patient, where an urgent need for medical care exists. See also art 12 which requires a physician to accept everyone as a patient in an emergency.

76 Dawson, Rewards For the Rescue of Human Life, in the Good Samaritan and the Law (ed. Ratcliffe 1966) at 63.

77 RSO 1980 c 82 as amended s. 5(c).

UNITED KINGDOM, AUSTRALIA AND THE COMMONWEALTH

There is remarkable unanimity throughout the Commonwealth on the legal position of the good samaritan. Nowhere is there a general legal duty to go to the assistance of others. The exceptions are essentially similar, and the developments in the law have been modest and few. The principles derived from English law have been assimilated in the common law of all the major Commonwealth jurisdictions. The exceptions, particularly the rescue doctrine, travelled to England from the United States[1] and thence to all parts of the Commonwealth.

A survey of the literature (which is sparse) and the case law (which is slender) suggests that the law on this topic has remained static. The last important case in England was decided in 1960.[2] The last important case in Australia was decided in 1961.[3] There appear to be no important cases on the topic in New Zealand. The Canadian case of *Horsley v MacLaren* (the *Ogopogo*) has generated more discussion in the journals than any other rescue case in the last 30 years.

So far as legislative developments are concerned, there have been none that radically alter the basic common law rules. England and New Zealand have established Criminal Injuries Compensation Boards, which function in the same way as those in Canada. In New Zealand, the introduction of a no-fault system to replace the law of torts in personal injuries cases has affected the rescuer's means of obtaining compensation, but not his general right to stand aside.

Since there are no important variations in the law and few signs of activity or change, it is not proposed to devote further space to an examination of the law in these jurisdictions. A detailed examination of the law relating to the good samaritan would amount to no more than a repetition of the chapter on the law in Canada.

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1 See Haynes v Harwood [1935] 1 KB 146 (CA).

2 Videan v British Transport Commission [1960] 2 QB 650 (CA).

3 Chapman v Hearse (1961) 106 CLR 106 (HCA).

U.S.A.

I. Introduction

In many respects, the development of the law relating to the good samaritan in the United States mirrors that in Canada. The basic starting point is identical and the evolution of the law in the courts has been similar. It also illustrates the probable trend of the law in this subject in the common law provinces for, as in so many areas of law, the rights and duties of the good samaritan have received far more attention in the United States than elsewhere. Not long ago, the primary source of the law so far as the good samaritan was concerned was the common law, as it is still in most common law jurisdictions. In recent years, however, the focus in the U.S. has shifted to the legislature, which, in the U.S.A. means the state legislatures, for the rights and liabilities of the good samaritan, are a matter falling under state jurisdiction. As already noted, there are signs of a similar development taking place in some Canadian jurisdictions.

II. The Common Law Rule

The common law in the U.S. shares the basic starting point as the common law elsewhere: there is no general duty in law to go to the aid of someone in peril, even where this could be done without effort or risk. The rule has been reaffirmed in a number of cases.

> As a general rule, the law imposes no duty on one person actively to assist in the preservation of the person or property of another, even though the means by which harm can be averted are in his possession. The law does not undertake to make men render active service to their neighbours at all times when a brave man would do so.[1]

> For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or for faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant is swift and sure.[2]

The rule appears in all the major texts[3] and the law reports are littered with grim illustrations of its consequences. It has been held, for example, that a physician has no legal duty to tend to the wounds of a stranger.[4] An expert swimmer may stand aside and watch a child drown.[5]. One who sees another about to walk into a dangerous machine is under no obligation to shout a warning, let alone push him to safety.[6] A bystander may watch a blind man or a child walk over a precipice and yet is not required to give a warning.[7]

As in Canada, the courts in the U.S. have sought to persuade the citizen to render assistance in times of emergency by creating certain qualifications to the basic right to do nothing and removing most of the legal risks of making a voluntary, honest effort to assist. The techniques they have developed for this "carrot and stick" approach are basically the same as those used by Canadian courts. These techniques are outlined below.

III. Qualifications to the Common Law Rule

1. The Contraction of the Basic Right to Stand By and Do Nothing

1) The imposition of a specific legal duty to render assistance whenever there is a "special relationship" between the parties

As in Canada, the courts have narrowed the gap between law and morality by imposing a legal duty to act whenever they consider that a special relationship exists between the parties. A special relationship would give rise to a duty to render assistance, and a breach of that duty could result in civil liability in tort.

The range of special relationships corresponds broadly to that assumed to exist in Canada. The signal difference is the existence of more case law, not necessarily more exceptions to the rule. The range of special relationships giving rise to a duty to take positive action varies widely among states.[8] The common carrier has a duty to his passengers to take to take reasonable steps under in the circumstances to protect them from physical harm, rescue them from danger and render assistance if they are ill or injured. A similar duty is owed by the innkeeper to his guests, by the shopkeeper and his customers, the captain to his crew, the employer and his employees, a host to his guests. Other special relationships include a legal custodian and his charge, such as a gaoler and his prisoner or a school and student and, in some instances, members of the family circle, such as husband and wife and parent and child.[9]

As in Canada, the range of special relationships is gradually being expanded by the courts to cover more remote relationships, e.g., the landowner toward a trespasser, drinking companions on a social outing. The common law rule is gradually being "consumed and supplanted by the widening ambit of exceptions." [10] But progress has been slow and sporadic, and the erosion of the common law rule is far from complete. [11]

2) Supplementing criminal statutes imposing a duty to render assistance with a legal duty in tort

A number of states have enacted penal legislation imposing a duty to render assistance in certain circumstances. One of the most common is the "Stop and Aid" law requiring the driver of a vehicle involved in an accident to remain at the scene and render assistance to anyone injured, regardless of fault.[12] The extent of the duty varies from a general obligation to render "reasonable" assistance, to a more specific requirement to transport the injured party to hospital for treatment if that is necessary or the injured person so requests.[13]

One difference from the situation in Canada, where similar legislation exists, is the greater willingness of American courts to allow the injured party a civil action for damages to be founded on a violation of the criminal statute, even though the statute is silent on the matter.[14]

2. Insulating the Good Samaritan from Liability or Loss

1) The development of the rescue doctrine

The modern rescue doctrine throughout the common law world owes much to Mr. Justice Cardozo who, as a judge of the New York Court of Appeals, reformulated much of the law of negligence in a series of important judgments. The most celebrated of these was delivered in *Wagner v. International Railway*, decided in 1921.[15]

In that case, a passenger on an overcrowded train fell out and disappeared into the night when the train lurched violently as it was crossing a bridge. His cousin (the plaintiff) stopped the train and walked back along the tracks trying to find him. It was dark, and all he found was a hat before he lost his footing, fell off the bridge and was badly injured.

The court held that the passenger had fallen from the train because the doors had not been closed and the train was overcrowded. A dangerous situation had been created due to the negligence of the railway company. In awarding damages to the plaintiff for injuries sustained in the unsuccessful rescue attempt, Cardozo J. stated, in a judgment that is striking for its eloquence as well as its quality:

> Danger invites rescue. The cry of distress is the summons to relief.... The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.... The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid.... The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path.... The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is as accountable as if he had.[16]

This classic judgment was elaborated in later American cases[17] and gave to a series of propositions dealing with the rights and the risks of rescuers that apply in most common law jurisdictions:

a) The danger that "invites rescue" must be imminent and real and not imaginary or speculative. The courts will determine this by considering the reasonableness of the rescuer's belief as to the seriousness of the danger rather than by the wisdom of hindsight.

b) If the danger were created by the negligent conduct of the victim or a third party, the rescuer could recover damages from the negligent party for injuries or other losses suffered as a result of answering the "summons to relief." But if there were no negligence, there would be no "wrongdoer," and thus there would be no right to recover anything from anybody.

c) The law will not weigh with technical precision the rules of contributory negligence or voluntary assumption of risk. As Cardozo J. said, "the emergency begets the man." Only if there is "outright recklessness" or "wanton" exposure to a danger that was useless will the good samaritan jeopardize his right of redress. In this regard, what might be "reasonable" if done in order to save the life of a human being might be considered "reckless" if done to preserve property. [18]

2) Lowering the standard of care demanded of the good samaritan.

The good samaritan must act with "reasonable care under the circumstances" or risk being held liable to the victim for any physical damage or injuries he may have caused.[19] If he is sued, he may have to show that his conduct in the circumstances was reasonable. But a person who is willing to risk his safety in order to rescue another is favoured in the eyes of the law. As Cardozo J. stated, an error of judgment "would not count against him if it resulted from the excitement and confusion of the moment."[20] Neither will it count against the good samaritan who renders assistance in the heat of an emergency without risking his own safety as, for example, when a passerby stops to administer first aid to someone injured in an accident. The

existence of an emergency and the exigencies of the situation are potent factors in determining what is reasonable under the circumstances.[21]

In practice, a good samaritan will not be held liable to the victim in tort unless his conduct in the circumstances was so unreasonable as to amount to gross negligence. In that unlikely event, the extent of his liability will be limited to the additional harm his actions caused to the victim. The common law demands that the good samaritan act responsibly in the circumstances, but he is not an insurer and is never required to more than is reasonable in all the circumstances.

As a volunteer, he is free to withdraw his assistance but, at the same time, a good samaritan is bound to act with reasonable consideration for the victim's safety. A person who has just been pulled out of a poisonous trench cannot be abandoned unconscious in the middle of the highway wantonly exposed to new risks.[22] Nor is the rescuer free to withdraw his assistance without good reason if to do so would worsen the position of the person in distress.[23] As Cardozo J. once remarked, "the hand once set to task may not always be drawn with impunity though liability would fail if it had never been applied at all."[24] Thus it has been held that a good samaritan who has promised to get medical help for a seriously injured person may be liable for any additional complications if, without good reason, he decides, a short while later, not to bother. [25]

3. Preventing Third Parties from Obstructing the Efforts of a Good Samaritan

In recent years, the courts have recognized that even if there is no legal duty to render assistance oneself, there is a legal duty not to interfere with someone who is prepared to help in an emergency. Anyone who intentionally or negligently obstructs the efforts of a good samaritan may be liable to the victim for any physical damage caused by preventing assistance from being rendered.[26] This principle was recently applied in an important decision in California.[27] Someone entered the defendant's bar and told the bartender that a man was brandishing a gun in a restaurant across the road and threatening to kill someone. He asked the bartender to call the police. The bartender refused, so the would-be rescuer said that he would call the police and asked permission to use the phone. Again, the bartender refused. Meanwhile, a murder took place in the restaurant and the murdered man's heirs sued the owner of the bar for damages alleging that the bartender's conduct was the proximate cause of the plaintiff's death and their loss.

The court reaffirmed the basic rule that the defendant owed no legal duty to do anything to assist and therefore could not be faulted (in law) for refusing to call the police. But there was a duty in these circumstances not to impede someone who was willing to call for help. The court did not expand any principles or make new law. It emphasized that it was dealing with the issue of access to a phone located in a commercial establishment open to the public. A householder would not be liable if he refused to allow a stranger into house to phone for help. [28]

The common law dealing with the good samaritan does not appear to have had much success in shaping social attitudes to encourage the citizen to emulate the good samaritan. Periodically, incidents occur in the United States that show all too graphically that exceptionally callous and feckless behaviour is still acceptable in the eyes of the law.

One such incident - the Genovese case - occurred in New York in 1964. A woman was stabbed outside her apartment building while her neighbours watched from the safety of their apartments. No one telephoned the police. When she screamed for help, her attacker fled but, when he saw that no one responded, he returned not once but twice to stab her again and finally

kill her. When asked why they did nothing to help, most of the 38 neighbours replied that they did not want to get involved, even to the extent of calling the police.

Another notorious incident occurred in New Bedford, Mass. in 1983 when the patrons of a tavern stood by and watched (some even cheered) as a woman was seized, tied up and gang raped on a pool table. The assault lasted for more than an hour but no one tried to rescue the victim or attempted to call the police.[29] Once again, the predominant excuse was a fear of getting involved.[30]

There are also well-publicized instances of doctors refusing outright to stop and render assistance at the scene of an accident, whether it be to the injured motorist lying on the Bronx Whitestone bridge or the skier on the slopes of the Sierre Madre.[31] The physician, too, does not want to get involved, for fear of malpractice suits.

When incidents like these occur, questions are raised about the soundness of legal rules that allow human beings to display utter disregard for the safety and welfare of others. Another spate of articles appears in the law journals, and the debate is renewed about whether the law should impose on the citizen a duty of "easy rescue," whether the immunity from suit enjoyed by the good samaritan should be strengthened, and how public misconceptions about the potential risks of doing anything to help can be corrected. The difference now is that there is the realization that while the fundamental rule of the common law may be "eccentric and isolated," [32] it is not likely to be overturned soon by the courts. Changing social conditions may lead to the recognition of new duties, [33] but progress has been slow and sporadic in this area of the law. During the last 20 years, therefore, attention has shifted to the legislature.

IV. Legislative Reform

1. Good Samaritan Legislation

All 50 States and the District of Columbia have enacted good samaritan statutes. The legislation is noteworthy for three reasons: the number of acts, their diversity - and the continuing debate about their utility. The legislation has been dismissed as unnecessary, defended as socially progressive and criticized as unfair.

In 1983, it was estimated that there were 109 good samaritan statutes for 51 jurisdictions.[34] They range from a one-sentence provision in West Virginia to 14 separate Acts in California. While they share many similarities the statutes vary widely on such fundamental aspects as the duty to render assistance, the degree of protection conferred and the definition of a good samaritan. Some statutes apply to anyone who renders assistance in times of emergency, others apply only to physicians and other medical personnel. There are statutes to protect policemen, firefighters and ambulance attendants and even some which confer immunity on veterinarians who go to the aid of an animal injured on the road.

Notwithstanding the array of differences, the good samaritan statutes may be divided, for present purposes, into three main categories:

- Legislation that imposes a legal duty upon the citizen to render assistance to someone in peril, backed up by a criminal penalty for failure to do so.

- Legislation that offers immunity from civil liability to any good samaritan who volunteers his services but does not impose any legal duty to render assistance.

- Legislation directed to protecting certain professional groups from civil liability under certain conditions, e.g. physicians who render emergency medical assistance at the scene of an accident.

1) Legislation imposing a duty to render assistance to those in peril

Very few States impose a duty on the bystander to render assistance and only in Vermont and Minnesota is that duty both general in scope and active in nature.

The Vermont statute [35] (enacted in 1967 in the aftermath of the Genovese incident) imposes on everyone a duty to render "reasonable assistance" to anyone known to be "exposed to grave physical harm" and not already taken care of, provided he can do so without danger to himself or "interference with important duties owed to others." There is a small penalty - a fine of up to $100 - for "wilful" failure to render assistance.

Those who do provide "reasonable assistance" as required by law will be immune from civil liability unless their acts amount to "gross negligence" or they are paid for their services. The duty to assist is imposed on everyone but the benefit of immunity from suit is conferred only on the volunteer. Another provision in the statute stipulates that "practitioners of the healing arts" shall be held to the ordinary standards of care for acts committed in the ordinary course of their practice." What began as a measure sponsored by the medical profession and designed to lower their exposure to malpractice suits apparently boomeranged. [36]

The Minnesota statute, enacted in 1983 is virtually identical to that in Vermont so far as the imposition of a legal duty to render assistance is concerned. Its language is also clearer:

> Any person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that he can do so without danger or peril to himself or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. Any person who violates this section is guilty of a petty misdemeanour.[37]

The statutory protection from civil liability afforded to the good samaritan is similar in scope in that it benefits only unpaid volunteers. In Minnesota, however, the good samaritan will be liable only if he acts in a "wilful and wanton or reckless manner," a standard of care that may be lower than its equivalent in Vermont.

Two other States, Massachusetts and Rhode Island, have enacted statutes that make more limited demands on the citizen. Reduced to their essence, these statutes impose a legal obligation on the citizen to call the police if he sees a crime of violence being committed. Both statutes were enacted in the wake of the infamous gang rape in New Bedford in 1983 when no one bothered to call the police.[38]

The Massachusetts Act requires a bystander who witnesses a rape, murder, manslaughter or armed robbery to call the police "as soon as reasonably practicable" if he can do so "without danger or peril to himself or others." The penalty for failing to do so is a fine of between $500 and $2,500. The Rhode Island statute limits the duty to call the police to crimes involving first degree sexual assault. A breach is punishable by imprisonment for up to one year or a fine not exceeding $500. [39]

2) Statutes conferring immunity from civil liability on the good samaritan

This is the most common type of good samaritan legislation. At least 36 states and the District of Columbia have enacted general legislation designed to encourage the ordinary citizen to render assistance in times of emergency. They impose no legal duty to act but shield the good samaritan from liability to the victim for acts of ordinary negligence if he chooses to render assistance to someone whose life or safety is in peril.

It is doubtful whether there exists among the diverse acts any "standard" good samaritan statute for there is a wide variation in the breadth of immunity conferred and the conditions for qualifying for immunity. For present purposes, the Utah statute, enacted in 1983, may serve as a illustration of this type of measure. The principal section of the Utah Act provides:

> A person who renders emergency care at or near the scene of an emergency, gratuitously and in good faith, is not liable for any civil damages as a result of any act or omission by the person rendering the emergency care unless the person is grossly negligent. As used in this section, "emergency" means an unexpected occurrence involving injury, threat of injury, or illness to a person, including motor vehicle accidents, disasters and other accidents and events of a similar nature.[40]

It will be seen that the provision contains four basic requirements:

- **Any assistance must be rendered gratuitously**

The requirement that a good samaritan render assistance without compensation appears to be a standard feature of most good samaritan statutes. If the good samaritan is to benefit from the protection afforded by the statute, he must render assistance without remuneration. A reward may be offered to the good samaritan as a gift from a grateful victim but it is essential that there be no contractual relationship between the parties. If he accepts, or later tries to recover compensation for services rendered, the good samaritan will forfeit any statutory protection from civil liability conferred by the Act.

The requirement that the good samaritan act without remuneration is consistent with the traditional notion of the good samaritan as an unpaid volunteer. But few statutes define "remuneration" or spell out the right, if any, to reimbursement of out-of-pocket expenses. And, as will be seen, the requirement that professional groups such as physicians give up all claims to compensation when they provide emergency care at the scene of an accident is controversial and less widespread.

- **The zone of protection is limited**

Immunity from civil liability exists only for aid rendered by the good samaritan at or near the scene of the emergency. The Utah statute is less specific than some which expressly extend the "scene," and thus the umbrella of protection, to cover the transportation of the victim to hospital or his delivery into the hands of professional care. The absence of such a provision is unlikely to affect the interpretation of the statute since transportation is often necessary to complete the rescue.

- **The good samaritan is insulated from civil liability unless he is "grossly negligent"**

The minimum standard of care imposed on the good samaritan varies widely among the 109 statutes. Most statutes applicable to the ordinary citizen shield the good samaritan from civil liability unless there is proof of aggravated misconduct, whether described as "gross negligence" as in Utah, or "wilful or wanton misconduct" as in Colorado. The significant factor is that these Acts expressly exempt the good samaritan from liability (and sometimes from suit) for conduct amounting to ordinary negligence.

Whether the standard of care sustituted by these statutes is any lower in substance than that demanded from the good samaritan by the common law is open to debate. Some commentators take the view that the common law would not hold a good samaritan liable for errors of judgment or conduct that in other circumstances would amount to ordinary negligence. Therefore, it is argued, the standard of care imposed on the good samaritan by the common law would produce exactly the same result in a given case as either of these statutory formulae. Some state legislatures appear to share that view for they have incorporated the ordinary common law standard which, it will be recalled, is the duty to take reasonable care under the circumstances, into the text of their good samaritan acts. Thus, the Florida statute protects the good samaritan "where the person acts as an ordinary prudent man would have acted under the same or similar circumstances."[41] Similar provisions can be found in the legislation of Arkansas, Mississippi, and Minnesota. At the other end of the spectrum is the Nebraska statute which seems to confer absolute immunity on the good samaritan provided only that he acts gratuitously.[42]

- **The good samaritan must act in good faith**

Most jurisdictions require the good samaritan to act in good faith when rendering assistance. It is uncertain what, if anything, this subjective requirement adds to the other prerequisites to protection from civil liability in the Utah Act. Good faith will not save the good samaritan who has acted recklessly; indeed, a finding of gross negligence may be inconsistent with good faith. The value of this extra requirement would seem to arise only in the few good samaritan statutes which confer immunity without imposing any statutory standard of care. The requirement of good faith in such cases might temper what otherwise might be construed as absolute licence.

3) Good Samaritan Legislation Protecting Members of Particular Groups

Most States have several good samaritan statutes on the books. One is usually general in scope and, like the Utah Act, grants immunity from suit to any person who acts as a good samaritan. The other (or others) are usually restricted to certain groups or professionals. The most common group to benefit from special legislation are members of the medical profession.

a) Physicians and other licensed medical professionals.

The medical profession was the first and, for a time, the only group to be protected by good samaritan legislation. The first good samaritan legislation in the United States was a statute protecting physicians passed by California in 1959. The legislation was reported to have been prompted by a well publicized incident in which a doctor refused to render emergency aid, and strong lobbying by the physicians.[43] A survey of 1,200 doctors in 1961 revealed that only about 50 per cent would stop and provide medical assistance at the scene of a roadside accident. The main reason given for refusing was the fear of malpractice suits, even though a study by the

American Medical Association of about the same time concluded that "the risk of legal liability for a physician who gives emergency care to a stranger away from his office or hospital is infinitesimal in comparison with the risks in other phases of legal practice." [44] Another study in the same year revealed that fewer that 30 per cent would respond immediately if they were sitting in a theatre and heard the call "Is there a doctor in the house?" [45]

The movement spread quickly and by 1969 24 states had enacted good samaritan legislation confined exclusively to doctors and other medical professionals. As one judge rather caustically remarked, the legislation protecting the medical profession stands as a "monument to the ...physician's reluctance or refusal to give medical assistance, even in emergency situations, without the firm assurance that he is immune from the [legal] consequences of fulfilling his moral obligations as a doctor." [46] Today, the protection from suit is also offered to others: no more than seven states restrict immunity to physicians.[47]

Although the statutes vary widely from one jurisdiction to the next, most provide the "firm assurance" that a doctor who stops to provide emergency aid at the scene of an accident will be immune from suit - at least if he is licensed to practice in that particular State.[48] For the purposes of illustration, consider the statute protecting physicians and nurses licensed to practise in Utah.

The Utah *Medical Personnel Act* provides as follows:

> No person licensed under this chapter who in good faith renders emergency care at the scene of the emergency, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care. [49]

In certain respects, the statute resembles the statute protecting any person who acts as a good samaritan, which was examined above. Thus, the zone of protection is limited to the scene of the emergency. To benefit from the immunity conferred by the Act, the physician must have acted in good faith. But the differences are more striking than the similarities. Ordinary good samaritans protected by the general statute have only qualified immunity. They are shielded from liability for ordinary negligence but remain liable for "gross negligence." The protection afforded to those who qualify under the *Medical Personnel Act* is virtually absolute. Provided they act in good faith they will be immune from any liability.

Another marked difference is the absence of any requirement in the *Medical Personnel Act* that the emergency care be rendered gratuitously. The physician can charge a patient for medical services rendered at the roadside and still preserve his immunity under the *Medical Personnel Act*.

Similar statutes can be found in about 13 other jurisdictions. A few are broader than the Utah Act, but many states do not grant the medical profession the same degree of statutory immunity. For example, New York, Maryland, Vermont and Idaho do not protect the physician from liability for "gross negligence." Ohio, Delaware, Michigan, Indiana and Kentucky provide no immunity against "wilful or wanton misconduct." Florida, Arkansas and Oregon appear to impose on physicians rendering emergency care at the scene of an accident the ordinary common law standard, namely, reasonable care in the circumstances. In addition, the majority of states require that the emergency care be rendered gratuitously if the physician is to qualify for statutory protection from civil liability as a good samaritan. [50]

b) Other protected groups

The development of good samaritan legislation has been marked by a proliferation of statutes protecting particular groups which may be roughly classified as follows:

- secondary health care providers, including dentists, interns and nurses;
- emergency rescue personnel, including ambulance attendants, paramedics, members of search and rescue units and persons trained in cardio- pulmonary resuscitation;
- public servants such as fire-fighters and law enforcement officers ;
- others, including anyone who renders assistance at a boating accident, or a mining accident, restaurant proprietors who go to the aid of choking customers, and public school personnel.

Not all states have been quite so prolific as California, with 14 separate statutes, or Illinois with eight; but it is common to find states with three or more good samaritan statutes dealing with several different groups offering varying degrees of immunity and imposing differing standards of care.[51]

Some of these measures reflect stages in the evolution of good samaritan legislation from restrictive statutes limited exclusively to physicians toward general laws protecting anyone who acts as a good samaritan. Others stem from the passage by the U.S.Congress in 1973 of the *Emergency Medical Services Act* which provided federal funds for the establishment of state emergency medical services. Some states then proceeded to enact good samaritan statutes to protect EMS personnel from liability in tort provided they followed established procedures. Others did not, for it is controversial whether public officials or professional rescuers such as fire-fighters, policemen, ambulance attendants or EMS personnel can properly be described as good samaritans, as opposed to paid employees, and whether they should receive any special immunity for carrying out duties for which they are specially trained.

It appears that the real purpose of these good samaritan statutes is to reduce the risk of law suits against hospitals and public authorities. This will lower both the premiums for public liability insurance and the cost to the community of maintaining these essential services.[52] In Wisconsin, the *Emergency Medical Services Act* does not confer any immunity on EMS personnel but requires the EMS program to have adequate liability insurance to protect personnel from civil liability provided they carry out their duties in good faith. [53]

2. Judicial Interpretation of Good Samaritan Statutes

There are only a handful of reported cases interpreting good samaritan statutes. One survey of the law ending in 1981, found only 14 cases containing any discussion of good samaritan laws and only five focused on the legislation itself. Another search yielded seven reported cases.[54] The reported cases have dealt with the issue of what constitutes an "emergency" and "emergency care."[55]

One California decision held that a physician who rendered emergency assistance on an irregular basis and in the absence of any pre-existing doctor-patient relationship would be protected by good samaritan legislation.[56] Another rejected the extension of the legislation to a physician who was a member of a emergency call panel and responded to emergencies as part of his normal duties.[57] Both these cases were notable in that they involved treatment in a hospital and not at the scene of the accident.

Two courts in Georgia upheld a defence based on the Georgia *Good Samaritan Act*. In one case, the plaintiff, a nurse in a convalescent home, slipped and broke her hip. She was

helped to an ambulance by other employees of the home and alleged that her injuries had been aggravated by their negligence. The court held that since the employees had no duty to help, and had acted gratuitously and in good faith they were insulated from liability for ordinary negligence.[58]

In the other case, a workman fell off a ladder and suffered spinal injuries while carrying out repairs to the defendant's house. The defendant, nonetheless, chose to move him and in doing so aggravated the plaintiff's injuries. It was held that even though the facts might justify a finding of negligence at common law, the defendant was protected by the Georgia *Good Samaritan Act*.[59] A court in Alaska refused to extend the protection of the good samaritan statute to a state trooper since he owed a legal duty to render assistance at the scene of an accident. [60]

3. Other Reactions to Good Samaritan Legislation

The absence of case law interpreting a statute is sometimes taken as a sign that the law has successfully resolved the problems that led to its enactment. If there are no cases there are no problems. Judged by this test the good samaritan laws in the United States have been remarkably successful. But a number of commentators are more sceptical, and there is a lively debate in the law journals in which the legislation has been dismissed as superfluous, defended as sound and criticized as unfair.

Some scholars dismiss the legislation as unnecessary.[61] The statutes have not done anything to solve a problem since there was no problem to resolve in the first place. There were few very reported cases at common law where a good samaritan had been sued by the person he had tried to rescue and fewer still where he had been held liable. There are few if any reported instances of a malpractice suit against a physician who stopped to render emergency assistance at the scene of an accident. The problem, they argue, was more imaginary than real and was adequately dealt with by the common law. The specre of the good samaritan being "mulcted" in damages by the person he had rescued is not a realistic fear and, given the flexible and forgiving standards of the common law, further statutory protection is unnecessary.

Others support the good samaritan statutes for their role in dispelling certain myths and misconceptions about the legal risks of acting as a good samaritan. There is value in a "legislative placebo" that is psychologically comforting and symbolic of an ideal held by society even if it hardly modifies the common law. The real function of these good samaritan Acts is to "raise the consciousness" of the citizen, increase his concern for the welfare of others and persuade those who are hesitant that they risk little by going to the aid of their fellow human beings. It does not matter if the good samaritan statutes do not materially alter the common law so long as they alter public perceptions about legal risks and potential liability. In an increasingly litigious society, statutory protection from suit or liability may discourage lawsuits. There is not much empirical evidence about the impact of good samaritan legislation upon social attitudes toward rendering assistance in an emergency.[62]

Scholars on both sides of the debate unite when it comes to criticizing the technical deficiencies of the good samaritan Acts. Too many statutes use general, undefined terms to specify the requisite standard of care ("gross negligence," "willful or wanton misconduct"), location ("at the scene of the emergency"), state of mind ("good faith"), acts covered ("emergency care"), and other conditions of ...immunity ("gratuitously," "without fee"). The vagueness, ambiguity and diversity of these multitudinous overlapping statutes have led to calls for the preparation of a uniform Act that would set out clearly the rights of the good samaritan and the limits on his potential liability.

A growing group of scholars argue that more is required to galvanize the citizen to render assistance in emergencies than statutes that merely protect him from liability in tort if he chooses

to do so. They favour legislation imposing a legal duty to render assistance as well as certain protection from liability in tort, like that in Vermont and Minnesota. The imposition of a duty to act backed up by a penalty is, they argue, more likely to produce positive results than voluntary good samaritan statutes.

> Research on causes of altruism suggests that an expanded legal duty to aid may lead to more rescue behavior, primarily because the legal duty would (1) decrease ambiguity surrounding situations in which help is needed by providing a rule or norm of what behaviour is considered appropriate, and (2) affect the cost-reward calculus people undertake in deciding whether to come to another's rescue.[63]

Furthermore, penal statutes are more likely to be known to the community than changes in tort liability, knowledge about which is generally confined to lawyers.[64]

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1 Sidwell v McVay 282 P 2d 756 (Okla SC 1956), citing with approval 38 Am Jur 658, Negligence, sec 169 .

2 Union Pac Ry Co v Cappier 66 Kansas 649 at 653, 72 P 281 at 282 (1930) which drew the following retort from Prosser: "In a wicked world, (this) would seem to be singularly in effective either to prevent the harm or compensate the victim" (Law of Torts 4th ed 1971 at 341).

3 See also the Restatement (Second) of the Law of Torts, section 314: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose on him a duty to take such action."

4 Hurley v Edingfield 59 NE 1058 (Ind. 1901).

5 Handiboe v. McCarthy 114 Ga App 541, 151 SE 2d 905 (1966).

6 Buch v. Amory Mfg Co 69 NH 257,44 A 809 (1898).

7 Buchanan v Rose 138 Texas 390, 392,159 SW 2d 110 (1942).

8 See Prentice, Expanding the Duty to Rescue (1984) 19 Suffolk UL. Rev 15 at 22; Prosser & Keeton on Torts (1984) at 376 and the Restatement s. 314A.

9 Fuerhelm, Taking Notice of Good Samaritan and Duty to Rescue Laws (1984) J. Contemp. Law 220.

10 Weinrib, The Case for a Duty to Rescue (1980) 90 Yale L.J. 247 at 248.

11 Speiser, Kraus & Gens The American Law of Torts (1985) ch 9, at 1141 ff; see also Prentice, supra note 8 at 20- 25.

12 See Prentice supra note 8 at 29; Cal Govt Code 13970; Illinois Rev Stat ch 951/2 11-403; N.C Gen Stat 20-166b; W. Virginia Code ch 17-C art 4; Texas Rev Civil Stat Ann art 6701d.

13 Seagraves, The Duty to Rescue in California (1984) 15 Pacific L.J. 1261 at 1276.

14 See Seagraves, supra note 13 at 1286; Boyer v Gulf Col & Santa Fe Ry 306 SW 2d 222 (Tex. Civ. App. 1957).

15 232 NY 176, 133 NE 437 (1921).

16 Id at 437-438.

17 Provenzo v Sam 23 NY 2d 256, 244 NE 2d 26 (1968).

18 See Restatement section 472.

19 Restatement, section 323.

20 Supra note 15 at 438.

21 Restatement, section 296(1); Dunston v Friedlander 369 So. 2d 792 (Ala. 1979); Farwell v Keaton 396 Mich 281, 240 NW 2d 217 (1976).

22 Restatement, sections 323 (comment c); 324(b).

23 Restatement, section 323.

24 H.R. Moch Co. v Rensselaer Water Co. 247 NY 160, 167; 159 NE 896, 898 (1928).

25 Warren v City of Indianapolis 176 Ind App 481, 488, 375 NE 2d 1163, 1167 (1978).

26 Restatement, section 327; Miller v Arnel Corp 129 Ariz 484, 490, 632 P 2d 987, 991(Ariz App 1981)

27 Soldano v. O'Daniels 141 Cal App 3d 443, 190 Cal Rptr 310 (5th Dist. 1983).

28 See Prentice, supra note 8 at p 28; Annotation, Am Jur POF. 2d ss 41-305.

29 Keisel, 69 ABAJ 1208 (1983).

30 Such incidents tend overshadow examples of altruism and courage incidents which may not always receive the same publicity. See, for example an incident in Little Rock, Arkansas, reported in *The New York Times* of Saturday, Aug. 1, 1987 under the headline "Woman 65 and Cane to Rescue." "A disabled poetry editor who ran down a flight of stairs and wielded her cane to help scare away a young woman's attacker says she is not a heroine, just a concerned neighbor." She is reported to have said, "You can't stand by while someone gets hurt."

31 The incident that precipitated legislation in California; see Note: 64 Good Samaritans and Medical Malpractice (1964) Columbia L.R. 1301; Note: (1962) 50 Cal. L.R. 816, 818.

32 Weinrib, supra note 10 at 248.

33 Prosser, supra note 2 at 327.

34 Brandt, Good Samaritan Laws - The Legal Placebo (1983) 17 Akron L.R. at 303.

35 Duty to Aid the Endangered Act - Emergency Medical Care, Vt Stat Ann title 519 (1973).

36 See Franklin, Vermont Requires Rescue, (1972) 25 Stan L.R. 51 at 53.

37 Minn Stat Ann title 604.05 (1982) There are some minor differences see Radcliffe, A Duty to Rescue: The Good, the Bad and the Indifferent - the Bystander's Dilemma (1986) 13 Pepperdine L.R 387 at 403.

38 Mass Gen Laws Ann ch 268, title 40 (1983); RI Gen Laws title 11-37-3.1 (1983).

39 So far as is known, there have been no prosecutions under these acts: see Levmore, Waiting for Rescue: an Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations (1986) 72 Virg.L.R. 879 at 897. Nor, it appears have they be used by a victim to found civil liability for failing to act. The Vermont Act was considered in State of Vermont v Joyce 433 A 2d 271 (1986).

40 Utah Code Ann title 78-11-22 (1983) see Feuerhelm, supra note 9 .

41 Fla. Stat. Ann. title 768.13 (West supp 1981).

42 Neb. Rev Stat title 25-1152.

43 See Note: Good Samaritans and Medical Malpractice (1964) 64 Columbia L.R. 1301.

44 AMA Professional Liability Survey (1963) cite in Helminski, Good Samaritan Statutes: Time for Uniformity (1980) 27 Wayne L.R. 218 at 223, note 37.

45 See generally, Note: (1962) 72 Harv. L.R. 641; Note, (1963) 51 Cal. L.R. 816.

46 Re Nemser(1966) 51 Misc 2d 616, 273 NYS 2d 624 at 630. The court added that "even without such legislative safeguards, a court would be and should be loath to hold any physician legally responsible for any consequences flowing from sudden, emergency required, competent medical treatment or experimentation."

47 See Mapel and Weigel, Good Samaritan Laws - Who Needs Them? (1981) 21 So.Texas L.J. 327 at 331.

48 Out-of-state physicians may not always be protected: in that event they would have to rely on general good samaritan legislation applicable to the ordinary citizen.

49 Utah Code Ann title 58-12-23.

50 See generally Mapel and Weigel, supra note 47.

51 Norris, Current Status and Utility of Emergency Medical Care Liability Law (1980) Forum 377 at 383.

52 Mapel and Weigel, supra note 47 at 44.

53 See Norris, supra note 51 at 398.

54 Brandt, supra note 34 at 328 ff.

55 Dahl v Turner 80 NM 564, 458 P 2d 816 (1969); Gragg v Neurological Assoc 159 Ga App 525, 284 SE 40 (1981).

56 McKenna v Cedars of Lebanon Hospital 93 Cal App 3d 282, 155 Cal Reptr 631 (1969).

57 Colby v Schwartz 78 Cal App 885, 144 Cal Reptr 628 (1978).

58 Gordon v. Athens Convalescent Center 146 Ga App 134, 134 SE 2d 484 (1978).

59 Wallace v Hall 145 Ga App 610, 144 SE 129 (1978).

60 Lee v State of Alaska 490 P 2d 1206 (1978).

61 See eg. Brandt, Good Samaritan Laws - the Legal Placebo (1983) 17 Akron L.R. 303, D'Amato,The Bad Samaritan Paradigm (1975) 70 Nw U L.R. 798.

62 Sharpe, The Law and Medicine in Canada 2d ed 1986 ch 15.

63 Brady, The Duty to Rescue in Tort Law: Implications of Research on Altruism (1980) 55 Indiana L.J. 551 at 561.

64 Eg. Levmore supra note 39 ; Rudolph,The Duty to Act: A Proposed Rule (1965) 44 Neb L.R. 499

CIVIL LAW JURISDICTIONS

QUEBEC

I. Introduction

The law pertaining to the good samaritan is different in Quebec from that in the common law provinces. Some of these differences are attributable to the Civil Code and the underlying principles of the law of delict. Others stem from the enactment of legislation that does not have any counterpart in the common law provinces.

Although the law may be different, the experience appears to be the same. Suits against rescuers have been extremely rare, including malpractice suits against doctors rendering emergency treatment at the scene of an accident. There was a certain nervousness in the profession during the 1960s, when good samaritan legislation to protect doctors was being enacted all over the United States, but the Government of Quebec rejected a request by the profession for such legislation.[1] As is outlined below, Quebec is unique among the provinces for having imposed a duty on everyone to render assistance to those in peril.

II. The Duty To Render Assistance

In Quebec, there is a general legal obligation to go to the aid of a person whose life or physical safety is imperilled. Unlike the common law jurisdictions, the law in Quebec does not rely on the fortuitous arrival of a good samaritan, in times of emergency. Instead, it follows the European tradition of imposing a legal duty on every person to go to the aid of another in distress. Anyone in breach of this duty may be liable to pay damages to the person who suffers as a result. In addition, it is possible that breach of this civil obligation might trigger criminal liability under the Criminal Code.

The obligation to render assistance stems from two primary sources: the Quebec *Charter of Human Rights and Freedoms*, and the provisions of the Civil Code. There is, unfortunately, little or no reported jurisprudence interpreting these provisions.[2]

1. The Quebec Charter of Human Rights and Freedoms

Section 2 of the Quebec Charter, enacted in 1975 and proclaimed in force in 1976, declares that "Every human being whose life is in peril has a right to assistance." It goes on to provide that:

> Every person must come to the aid of anyone whose life is in peril, either personally or calling for aid, by giving him the necessary and immediate physical assistance, unless it involves danger to himself or a third person, or he has another valid reason.

In essence, this provision imposes what in the U.S.A. is termed a general duty of "easy rescue;" that is, a duty to go to the aid of another if one can do so without serious risk to oneself or a third person. Section 2 of the Charter has been welcomed by some as a clear and unequivocal legal directive of a basic right.[3] Putting it in the Charter has added to its prominence and serves to increase public awareness about the existence of the obligation.

But the section has also been roundly criticized. One of the major criticisms concerns the narrowness of the obligation. The duty to go to the aid of another is owed only to persons "whose life is in peril." Why, its critics ask, should the obligation arise where the danger

threatens life but not where it threatens limb?[4] Another more controversial criticism is that the provision is superfluous, since a duty to render assistance to someone in peril already exists under the Civil Code.[5]

2. The Civil Code

Article 1053 of the Civil Code provides as follows:

> Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

Under article 1053, every person is under an obligation to conduct himself as a *bon père de famille*, a standard of behaviour that roughly corresponds to the common law standard of a reasonably prudent person. Failure to do so would amount to "fault" and give rise to legal consequences in delict (tort). Fault arises from conduct that falls short of the objective standard imposed by the law, whether it consists of misfeasance (acts) or non-feasance (omissions). Standing back and doing nothing to help a person in peril in circumstances where a *bon père de famille* would render assistance, or doing less than a *bon père de famille* would do, is legal fault. In Quebec, therefore, there is an obligation to go to the aid of another in peril if one can do so without danger to oneself or a third party. The failure to do so should constitute fault and be actionable under article 1053 of the Civil Code.

This is the orthodox view of Quebec law accepted by most Quebec jurists.[6] It also forms the basis of the argument that section 2 of the Quebec Charter duplicates an obligation that already exists under the Civil Code. If anything, the obligation under article 1053 reaches further than that in the Charter, for the duty is not limited to life-threatening situations. It can arise in situations where the danger is no less acute but the foreseeable consequences are less dire. It may also arise in connection with saving someone's property, which is not the case under section 2 of the Charter.

Nevertheless, section 2 is far from superfluous. Apart from the undoubted educational value of having a legal obligation of this kind set out in the Charter, section 2 clarifies an area of the law left muddy by jurists and judges.

The distinction between "misfeasance" and "non-feasance" which has been responsible for the failure of the common law to develop a general legal duty to render assistance in times of emergency has its philosophical parallel in the civil law.[7] Usually, the distinction was not allowed to become the controlling factor in determining the existence of a legal duty in the way that it was at common law.[8] A person was under a legal duty to conduct himself (acts and abstentions) according to the standards of the reasonable, and prudent *bon père de famille*.[9] Article 1053 was both the source of that legal duty and the measure of the obligation. But there were judicial dicta and opinions in France and Quebec suggesting that civil liability for failing to act could not be founded on article 1053 alone.[10] Article 1053 of the Civil Code would set the measure of the obligation but in cases of non-feasance the duty to act had to be found elsewhere. It might be imposed by statute or some other external source, such as a professional obligation, but it could not be derived from article 1053. This gloss on article 1053 has been variously attributed to the commingling of criminal and civil law notions of duty or civil and common law concepts. Whatever support it may still have, there is now a specific legal text imposing a duty to render assistance. The law has been clarified and the debate should subside.

III. Liability for Breach of Duty to Render Assistance

1. Under Section 2 of the Charter of Human Rights and Freedoms

Section 49 of the Charter confers a right on the victim to sue for damages to compensate for any losses resulting from breach of of his fundamental rights. These rights include the right to assistance if his life is in peril. The Charter also enables a court to award punitive damages if it finds that the breach of the fundamental right was intentional.

The Charter says nothing more about the question of liability for breach of section 2, except to exclude it from the provisions imposing a penalty for breach, presumably for constitutional reasons.[11] It does not deal with the issue of the standard of care or matters concerning the assessment of damages. These are left to be decided according to the relevant provisions of the Civil Code.

2. Under the Civil Code

As already pointed out, the standard of care imposed on the person carrying out his obligation to render assistance is that of the *bon père de famille*. This inexact standard is sometimes equated with the "reasonably prudent person." In this context, it resembles the common law standard applied in the rescue cases, namely, "such reasonable care as a person would take in his position, with his knowledge and with his defects" or simply "reasonable care under all the circumstances."

In substance, it means that a layman who can swim need not demonstrate the skills of a physician when rendering first aid. Nor does it require a physician to be an expert swimmer. But it does require a physician to demonstrate the first-aid skills of someone qualified in medicine, taking into account all the circumstances, and to live up to the ethical standards of his profession. And there may be times when both layman and physician have the same obligation to secure assistance from those able to provide it.

Questions concerning the measure of damages and the effect of contributory negligence will be resolved according the ordinary rules in articles 1045, 1074 and 1075 of the Code.

3. Under the Criminal Code

The enactment of section 2 of the Charter has raised an interesting question whether breach of that section could trigger criminal liability under section 202 of the Criminal Code. That section provides:

> (1) Everyone is criminally negligent who
>
> (a) in doing anything, or
> (b) in omitting to do anything that it is his duty to do shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purposes of this section, "duty" means a duty imposed by law.

There has been some debate over the meaning of "duty imposed by law" [12] but there is no doubt that a specific duty imposed by legislation is such a duty. Could someone now be charged under section 202 of the Criminal Code for having breached section 2 of the Quebec Charter? If so, there may be some question about the constitutionality of section 2. As the only province to have such a "duty imposed by law," section 2 of the Quebec Charter might be challenged on the

grounds that it violates the equality provisions in section 15 of the *Canadian Charter of Rights and Freedoms*. The question is moot and legal opinion is divided.

IV. Rights of the Good Samaritan

1. Under Section 2 of the Charter

No provision is made for compensating a person for personal injuries suffered or to indemnify him for losses or other out-of-pocket expenses incurred in performing his duty to render assistance. Such rights as exist lie in the Civil Code and in another Quebec statute, the *Act to Promote Good Citizenship*.

2. Under the Civil Code

It might be possible to rely on some implied contract to cover reasonable expenses incurred for the benefit of the person rescued. The contract might even cover professional fees, in the case of physicians or others who render professional services. Much will depend on consent and surrounding conditions. Failing that, a claim might be based on "enrichment without cause," although, since the services were rendered or expenditures incurred in the course of fulfilling a legal obligation, it may be difficult to argue the absence of "cause" as a legal obligation. The law is unclear and the situation still moot. [13]

3. Under the Act to Promote Good Citizenship

In 1977, before there was any statutory duty to render assistance to another in peril, Quebec passed an Act the purpose of which was to compensate those who had suffered injuries or other losses as a result of rescuing others.[14] Anyone who "benevolently" rescues someone who was "in danger of his life or of bodily harm" can apply to the Commission de la santé et securité du travail for the payment of a "benefit" of up to $1,000 for losses to property and according to the scales under the *Workmen's Compensation Act* for personal injuries. In addition the government may, on the recommendation of the Minister of Justice, award up to $5,000 (or decorations) for an act of "good citizenship."

The rescuer who merely does his legal duty is presumably ineligible for any compensation under this Act. He will not have acted "benevolently" and his actions will be considered obedience to the law rather than "good citizenship." The role of the Act is really confined to those who do more than is required by law - whether it be rescuing someone in danger of physical harm but not death, or exceeding the obligations of the *bon père de famille*. In other words, the law may require a person to undertake an "easy" rescue; it may reward him if he is brave enough to do more.

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1 See Roy, La médecine et le droit: Colloque (1975) 10 R.J.T. 10 at 33.

2 There is nothing on section 2 of the Charter and a survey of the law up to 1980 yielded only one reported case, Osborne v Commission de Transport (1958) SCR 257, which would have been decided the same way in the common law provinces; see Fagan v Comm'r of Metropolitan Police (1969) 1 QB 439 (CA). Further research yielded no others.

3 Rodgers-Magnet, The Right to Emergency Medical Treatment in the Province of Quebec (1980) 40 R du B 373.

4 As originally proposed by the Civil Law Revision Office, the duty would arise when someone was simply in danger.

5 Barakett & Jobin, Une modeste loi du bon samaritain pour le Québec (1976) 54 Can B.R. 291.

6 Baudouin, Les obligations (1985) at 60-61; Barakett & Jobin, supra note 5 at 295; Perret Colloque, supra note 1 at 46.

7 Tunc, La responsabilité civile (1981) at 47-50.

8 See the review of doctrine in Rodgers-Magnet, supra note 3 at 385-387.

9 See, in this context Osborne v Commission de Transport [1958] SCR 257.

10 See Barakett & Jobin, supra note 5 at 294-296.

11 The Criminal Code already covers criminal negligence resulting from acts or omissions in section 202.

12 See St-Germain v R [1976] CA 185.

13 See Barakett & Jobin, supra note 5 at 302.

14 RSQ 1977 c C-20.

EUROPE

I. Introduction

The treatment of the good samaritan in European jurisdictions stands in marked contrast to that in the Anglo-American common law world. As has been seen, the common law has traditionally refused to require a person to aid a stranger in emergency. It will praise and encourage the altruistic individual who acts as a good samaritan but it will not punish him if he decides to mind his own business and turn away. In Europe, on the other hand, there is a duty to render aid, and it is a criminal offence to ignore that duty.

There is a high degree of uniformity among the European laws on this issue, just as there is among common law jurisdictions, and it is tempting to attribute both the contrasts and similarities to their different origins and influences - the codified systems of Europe, inspired by Roman and canon law principles, versus the pragmatic and secular origins of the common law. It should be noted, however, that a person was not required to render assistance to a stranger under Roman law. Nor, in some States, was such a duty included in their original Codes. In fact, the the duty to provide emergency assistance is of quite recent origin in countries such as France and Belgium.

Although there are variations in the national laws relating to the good samaritan these are less significant than their many similarities, at least for present purposes. The major legal issues affecting the rights, risks and liability of the good samaritan will be examined using the same questions as were used for the common law jurisdictions. But, for the sake of clarity (and brevity), the law in France will be used as a model and any variations elsewhere will be noted in the appropriate context.

II. The Law Relating to the Good Samaritan

1. The Duty to go to the Aid of Someone in Peril

In France, there is a duty to rescue a person in distress under both criminal and civil law.

1) Under the French Penal Code

The duty was first imposed in 1941, in rather ironic circumstances, by the Vichy regime.[1] The law of 1941 was replaced in 1945 by another that was very similar. It is now Article 63 of the French Penal Code.

> Art. 63(2): Any person who wilfully fails to render or obtain assistance to an endangered person when such was possible without danger to himself or others, shall be (punished with imprisonment for three months to five years and a fine of 350 to 20,000 francs).[2]

In essence, the duty to rescue imposed by the Penal Code is much the same as the "duty of easy rescue" in Vermont and Minnesota. It also resembles the duty in Quebec, under section 2 of the Quebec *Charter of Rights and Human Freedoms*, except that the Charter imposes no penalty, probably for constitutional reasons. The duty to render assistance arises when:

- One knows that someone is in physical danger. The source of the danger does not matter: it could be a criminal assault or a boating accident. The danger must be imminent, pressing and require immediate intervention, [3] but it is not limited to a life or death situation. On the other hand, there is no duty under this section to rescue or protect property.

- It is possible to render assistance or secure help without any appreciable risk of danger (as distinct from minor inconvenience) to himself or to others. Article 63 condemns egoism, but it does not demand heroism. Someone who can swim must go to the rescue of a drowning child [4] and ruining his clothes is no excuse for standing by. Someone who cannot swim is bound to make reasonable efforts to get help from elsewhere.

If he does nothing, and if his inaction is voluntary and intentional, he commits a crime. This includes the person who caused the danger in the first place, whether by his own criminal act or otherwise. If someone assaults another and leaves his victim bleeding in the street, he will be liable both for the assault and for the failure to render assistance.

Article 63 has been applied fairly often over the years. One jurist has remarked that the severity of the law has been reinforced by the severity of the courts, particularly when dealing with the medical profession.[5] Doctors have been condemned not merely for refusing to do anything but also where they have arranged for an accident victim to be sent to a hospital, or sent to a colleague, instead of going themselves. Blind delegation may sometimes amount to wilful inaction.[6] Angina pains did not excuse a doctor from going to the aid of someone seriously wounded. [7]

At least a dozen European jurisdictions have adopted similar provisions, beginning with The Netherlands in 1881 and, most recently, Belgium in 1951. In Yugoslavia, the duty of the citizen to render assistance is enshrined in the constitution. Like France most impose a duty whenever there is a real danger of death or physical injury.[8] A few, like Denmark and Greece [9] require there to be a danger to life. In Germany, the duty is rather wider: it arises "in an accident or common danger or in an emergency situation" where "aid is needed and under the circumstances can be expected of him".[10] A few countries including The Netherlands [11] impose the duty only on those who actually witnessed the incident or were physically present at the scene of the danger. If they were not there at the time they do not have to go there to help. In most, the test is whether one were aware of the danger, either first hand or through being informed by others.

Some jurisdictions are more explicit about the kind of assistance expected from the citizen in order to fulfil his legal duty. In Italy and Norway, the citizen is required to notify immediately the proper authorities if he cannot render assistance himself.[12]

In most countries, criminal liability is not linked to the fate of the victim: it arises from the wilful failure to act. But in The Netherlands, the failure by someone to render assistance will only be criminal if the victim dies as a result.[13] In Italy, death in such circumstances will aggravate the crime.[14] The penalties also vary, from a maximum of three months imprisonment in Denmark, Italy and The Netherlands to up to two years in Iceland and five years in France.

2) Under the Civil Code

In France, there are two potential sources of civil liability for failing to render assistance. The first arises from the breach of the criminal law. It is now settled law in France that a person who should have been rescued can recover compensation from someone convicted of violating article 63 of the Penal Code. The purpose of the law, it has been held, is to protect the private rights *(intérêts privés)* as well as the public interest *(ordre public)*. It is enough to show that the criminal act (or failure to act) caused the damage for which compensation is sought. The claim can be presented and determined at the time of the criminal trial by appearing as a *partie civile* and in fact this has occurred on several occasions.[15] There may be problems of proof, since it will be necessary to show how, and to what extent, the original injuries were aggravated by the failure to render assistance.

It is unclear whether this kind of civil action for damages would be available elsewhere for violation of the equivalent provisions of the Criminal Code. The principle that civil liability can result from violation of a penal statute is well-entrenched in a number of continental countries, but it has not been possible to ascertain whether it has yet been established that such an action would lie for violation of the duty to render assistance. According to one scholar (writing in 1966) the issue is still under debate in Germany, for the courts have yet to determine whether article 330c of the Criminal Code was "protective" legislation of the kind that would allow for such an action. [16]

In France, liability will arise under articles 1382 and 1383 of the Civil Code if, by failing to render assistance in the circumstances, a person's conduct falls short of that expected of the *bon père de famille*. The duty imposed under the Civil Code is broader than that under the Penal Code since it may extend to the protection of property as well as the rescue of persons. As one leading scholar stated: "Civil liability will be incurred whenever it is the judgment of the court that a reasonable man, careful and mindful of others, would have acted and, the case may be, would have rescued the victim or prevented the damage." [17] Similar actions may be brought under the Civil Codes of other countries, notably Germany, Italy, Belgium and The Netherlands. However, the principle of "fault" is not everywhere as broad as in France.

The Czechoslovak Civil Code of 1964 [18] imposes a duty to "prevent injury to health and damage to property or undue enrichment to the detriment of society or individuals." This provision supplements the provision in the Criminal Code requiring the citizen to rescue another whose life is in danger. The individual must personally intervene if urgent action is needed to avert the danger, unless by doing so he would expose himself or others to serious danger. In any case, he is required to notify the authorities. Anyone who fails to take the appropriate steps to prevent damage to life, health or property has to compensate the victim for damage. This provision could be used by a victim to sue someone who failed to render assistance in an emergency for the damage caused by his inaction.[19]

2. The Right to Compensation for Injuries Suffered or Losses Sustained while Rendering Assistance

There exists in French law a rescue doctrine not unlike that developed by the common law jurisdictions. If the urgent need for assistance is caused by a dangerous situation created by the "fault" of another, be it the person in need of rescue or a third party, the rescuer has a right of civil recourse against that person. He is entitled to claim compensation for injuries and any other damage or loss caused by the person at fault. [20]

There are other means of recovering losses and out-of-pocket expenses. Depending on the circumstances, the courts are prepared to find an implied contract for the benefit of the person

who provided assistance. The person rescued would be contractually bound to indemnify his rescuer against losses and expenses. There may also be recourse for compensation under the principle of *negotiorum gestio*, a Roman law concept akin to implied agency that encourages emergency assistance but does not require it. Someone who voluntarily undertakes to "manage another's affairs" (e.g. rescues another or saves his house from burning down) when he is unable to do so himself (because of an emergency) is entitled to be compensated for any expenses incurred or losses suffered by his altruism. An example would be the person who finds another unconscious and pays for a taxi to take him to hospital.

The doctrine of *negotiorum gestio* has been used in the German courts to enable rescuers to recover both their out-of-pocket expenses and compensation for personal injuries. [21] It is enshrined in various European Codes including the Swiss Code of Obligations[22] and the Austrian Civil Code of 1811.

3. Potential Liability of the Good Samaritan

The risk that someone who does render assistance will be held liable to compensate the person rescued is relatively small. As in the common law jurisdictions, the standard of care is measured in part by the surrounding circumstances. The obligation is to act as a reasonable person in the circumstances, careful and mindful of others, and with the skills and knowledge he actually possessed. In most cases it would require misconduct tantamount to *faute lourde*, or gross negligence, for a rescuer to incur liability to the person rescued.

The risk of liability to a third party is probably rather greater. No protection against such liability is granted by either the Penal or the Civil Codes of France unless the rescue involves subduing a person attacking another. If the emergency was caused by someone's wrongful act, a court might order that party to cover any damage caused to the property of an innocent third party in the course of carrying out a rescue. The rescuer might also be protected if he had to damage another's property in order to fulfil his legal, or even his moral, obligation to assist. It has been suggested that if an innocent third party has to be compensated the courts might order compensation to be paid by the person rescued, as the beneficiary, rather than the rescuer.[23] The problem appears to be moot.

In some jurisdictions, this matter is dealt with by the Code. For example, the Czechoslovak Civil Code provides (in article 418) that the rescuer will not be liable for damage caused while responding, responsibly, to an emergency. He is also entitled to use another's property without permission if it is necessary to do so.

4. Rewarding the Good Samaritan

The suggestion that good samaritans be rewarded for their efforts and not simply compensated is often put forward by jurists. However, only one State in Europe has implemented this suggestion. In Austria, a law was passed to establish a fund financed by the State and cash grants are awarded to those who exceed their legal obligations by risking their lives to save others. It should be noted, however, that there is no general duty to render assistance to another under Austrian law. As has been noted, a similar fund exists in Quebec where such an obligation does exist.

1 A German officer was killed by the French Resistance, 50 hostages were shot in reprisal and then a statute was passed imposing a duty on the citizen to intervene to prevent crimes and rescue persons in danger.

2 "Sera puni...quionque s'abstient volontairement de porter à une personne en péril l'assistance que, sans risque pour lui ou pour les tiers, il pouvait lui prêter, soit par son action personnelle, soit en provoquant un secours...."

3 Crim 31 mai 1949, JCP 1949 II 4945, note Magnol.

4 Aix, 20 mars 1947, JCP 1947. II. 3583.

5 Mélennec, Traité de droit médical, (1984) t 3, ch iv.

6 Nancy, 27 oct, 1965, D. 1966.30, note Lorenz.

7 Trib. Corr. Béthune, 1950., JCP 1951.II.5990, note Pageaud.

8 Eg. Italy: Crim Code, art 593.

9 Denmark: Crim Code 1930, art 253; Greece: Crim Code 1950, Art 307.

10 Germany, Crim Code 1953, art 330c.

11 Crim Code 1881, art 450.

12 Italy: Crim Code, 1930, art 593; Norway: Crim Code 1902, art 387.

13 The Netherlands: Crim Code 1881, art 450.

14 Italy: Crim Code 1930, art 593.

15 Aix Trib. Corr. 27 mars 1947, D.304; Crim 30 mars 1972, JCP 1073.17.474, note Moret.

16 Dawson, Rewards for the Rescue of Human Life, in The Good Samaritan and the Law (ed Ratcliffe 1966), at 71.

17 Tunc, The Volunteer and the Good Samaritan, in The Good Samaritan and the Law (ed Ratcliffe 1966) 45 at 51.

18 Articles 416, 417.

19 See DeKuiper, Stalking the Good Samaritan: Communists, Capitalists and the Duty to Rescue (1976) Utah L.R. 507.

20 Tunc, supra note 17 at 53.

21 Dawson, supra note 16 at 64-68.

22 Art 422 (1912).

23 Tunc, supra note 17 at 54-55.

PART II

PROPOSALS FOR REFORM

INTRODUCTION

It was suggested in Part I of this study that the legal position of the good samaritan raises three basic issues, the treatment of which varies widely from one jurisdiction to another. The issues are:

- the duty to render assistance;
- the potential liability of the good samaritan if things go wrong;
- his rights to compensation if he sustains injuries or losses.

In most European jurisdictions, an individual is required by law to go to the assistance of someone whose life or physical safety is in immediate danger, provided he can do so without imperilling his own safety or posing a danger to others. The duty to render assistance is part of the criminal law. The penalties for breach vary widely, as do the reported instances of enforcement, but they generally include a fine or imprisonment, or both.

The failure to render assistance may also give rise to civil liability at the suit of the abandoned victim. The right to sue for damages, either independently or in conjunction with a criminal prosecution, is expressly granted by the Civil Codes of some jurisdictions and implicitly recognized in the jurisprudence of others.

The right to compensation and indemnification is less well-defined. Such a right will exist if the need for intervention is caused by someone's "fault" or culpable conduct. But if there is no culpable party, the right to compensation from the person who benefits is generally narrow, if it exists at all. Only in Austria is there a scheme allowing compensation to be granted from State funds.

In England, on the other hand, there is no general legal obligation to go to the aid of someone in peril, no matter how grave the plight of the victim nor how small the risk to the rescuer. A passerby may have a moral obligation to stop and assist but only in exceptional cases will he have a legal duty to intervene and take positive steps to help. Such cases are generally confined to instances where the courts or the legislature determine that there exists a "special relationship" between the parties for the purposes of the criminal or civil law, imposing a duty to intervene and assist. The categories of special relationships are not closed and their number is steadily increasing, at least in the civil law. But every extension is still viewed as an exception to the basic rule.

The good samaritan who follows his conscience and tries to assist a stranger is liable to be sued in tort if his efforts cause injury to the victim or harm to the person or property of third parties. In practice, the risks of suit and liability are small, owing to the apparent reluctance of those affected to sue and the willingness of the courts to adjust the ordinary standards of care in favour of the rescuer.

Just as there is no immunity from suit, the actions of a good samaritan give rise to no legal right to be indemnified for his own losses or injuries. If his losses or injuries result from intervening to save someone from criminal assault, the good samaritan may be eligible to receive compensation from the Criminal Injuries Review Board. In all other circumstances, his rights will depend upon proof of a legal wrong committed against him, whether negligence by a third party responsible for creating the peril, or negligence by the victim himself.

In the United States, the basic rule in virtually every State jurisdiction is the same as that in England: a bystander has no legal obligation to render assistance to a person in distress. Only three or four States have enacted penal legislation reversing the common law rule and making the wilful failure to render assistance, where this can be done without significant risk of harm to the rescuer or to third parties, an offence punishable by fine or imprisonment. On the other hand, every jurisdiction has enacted legislation to protect the good samaritan from legal liability toward the person he has attempted to help. More than 100 such statutes are in force and they vary widely in scope and effect.

The issues of compensation and indemnification of the good samaritan have not received the attention of the legislature. The courts will lean over backwards to assist the good samaritan who suffers injury or loss, but his legal rights under the "rescue doctrine" ultimately depend upon proof of negligence or another legal wrong committed against him.

The situation in Canada today is a patchwork or legal hybrid reflecting each of the three approaches outlined above.

All the common law provinces follow the Anglo-American common law rule that no one is obliged to assist a stranger whose life, limb or property are in urgent danger. The exceptions too, both common law and statutory, are broadly similar. Quebec, on the other hand, follows the European approach. The Quebec *Charter of Human Rights and Freedoms* declares that every human being whose life is in peril has a right to assistance and imposes a concomitant duty to provide such help upon everyone able to do so without putting himself or third parties in danger. But, unlike the European model, the Quebec Charter does not impose any penalty for breach of this duty, presumably for constitutional reasons. A breach of obligation in the Charter might still be grounds for a civil action by the affected party.

Five provinces (Ontario, Manitoba, Nova Scotia, New Brunswick and Prince Edward Island) follow the English model and leave the rights and potential liability of the good samaritan to be governed by the common law. The common law rules on these matters are identical to those applicable in England.

The other provinces and the two territories have enacted legislation designed to protect good samaritans from civil liability toward those they helped. The legislation in question follows the U.S. model and exempts those who voluntarily render emergency first-aid at the scene of an accident from civil liability for anything short of gross negligence.

In Canada, the good samaritan has no general right to receive compensation or indemnification for injuries or losses either from the person saved or from the State. As in England and the United States, the right to recover compensation by means of a civil suit will turn on proof of negligence (or "fault" in Quebec) by the victim or a third party. All the common law provinces have established schemes to compensate the victim of crime, but they follow the English model and share most of its limitations. They would cover a good samaritan who dives into a river to rescue a drowning man who had been thrown in with criminal intent, but not if he had fallen in by accident. The situation in Quebec is slightly more favourable to the good samaritan where there is legislation allowing limited compensation to be paid to a good samaritan who rescues another in physical danger and sustains injuries of losses in the process of doing so.

I. The Case for Reform

There is a body of opinion that the present law governing the rights, duties and liabilities of the good samaritan is unsatisfactory and in need of reform. Some believe that the present law simply does not to do enough to rouse the citizen to intervene and lend a hand in times of emergency. But there is a wide divergence of views about the kind of changes, if any, that are needed to improve the public response. In sum, the calls for reform in Canada do not amount to a loud or harmonious chorus.

Some, like the Law Reform Commission of Canada, believe that the criminal law should used to provide a forceful reminder to the citizen about his duty to help. They favour the European approach outlined in Part I of this study, and advocate the use of the criminal law to oblige the citizen to intervene and render emergency assistance. This might be described as the "positive duty" approach to reform.

Others, including certain sectors of industry and some organizations, take the view that the citizen needs to be relieved of his fears about volunteering to render assistance rather than reminded of his duty or coerced into action by the threat of fine or imprisonment. They oppose the imposition of any general legal duty to help and advocate instead statutory protection for the good samaritan from liability for negligence. This might be termed the "negative liability" approach.

Still others regard the case for reform as largely unproven and, although less vocal, would appear to prefer the status quo. In their view, unless and until there is sufficient evidence that calls for help from those in peril are going unheeded there is no need for any change in the law.

1. The Positive Duty Approach

The Law Reform Commission has recommended that the new Criminal Code require a person to go to the aid of another in danger and that it be a criminal offence to fail or refuse to do so without valid reason.[1] As the text makes clear, the proposal would reverse the old common law rule and impose a general duty of "easy rescue":

> 10(2) Failure to Rescue.
>
> > (a) General Rule. Everyone commits a crime who, perceiving another person in immediate danger of death or serious harm, does not take reasonable steps to assist him.
> >
> > (b) Exception. Clause 10(2)(a) does not apply where the person cannot take reasonable steps to assist without risk of death or serious harm to himself or another person, or where he has some other valid reason for not doing so.

The offence would be punishable by an unspecified, "relatively low penalty."

The stated reasons for recommending the creation of a new criminal offence were twofold. First, it would bring the criminal law into line with ordinary notions of morality, as already reflected in section 2 of the Quebec *Charter of Human Rights and Freedoms*. Secondly, it would bring Canadian law into line with the laws of many European states.

1) Reactions to the Commission's recommendation

This recommendation of the Law Reform Commission has received a mixed, if muted, reception. The good samaritan provision is only a minor item in an extensive report and has received limited attention. The Department of Justice has not yet dealt with this issue in its consultations with interested groups, and the Law Reform Commission has received very little feedback.

The Church Council on Justice and Corrections has reacted unfavourably to the proposal, largely on philosophical grounds. In its view, the criminal law should not be defining what is moral and immoral but only what is legal and illegal and "the ambit of the criminal law should not be widened by equating it with something as vague as ordinary moral intuitions."

The Canadian Association of Chiefs of Police is rather sceptical about the value of the proposal, although this may be attributable to what is seen as its technical shortcomings rather than matters of principle. In particular, the Association has expressed concern about the failure to spell out the responsibilities of police officers in enforcing the law and of the precise scope of the duty imposed on the citizen.

The Dangerous Goods Directorate of Transport Canada is concerned about the reluctance of persons and organizations to provide assistance at the scene of a dangerous goods spill. However, it is apparent that the Directorate does not view the proposal of the Law Reform Commission as a desirable solution. As is noted below, the Directorate would prefer to leave the choice a voluntary one and encourage would-be good samaritans by protecting them from civil liability for negligence.

The Canadian Protective Medical Association (the insurance company providing malpractice insurance to physicians) also opposes the imposition of legal duty to render assistance. The grounds for concern are not that this will significantly increase the risk of malpractice claims resulting from emergency roadside assistance. There are few if any such claims at present, and little or no concrete evidence that doctors currently refuse to stop. The concern is simply about the intrusion of the criminal law to regulate behaviour without any proven need.

The reaction of the press has also been mixed. *The Globe and Mail* stated in an editorial on December 5, 1986 that "There will be wide approval, we think, of the proposed law which provides penalties for those who fail to take reasonable steps to help another person in danger."

The Toronto Star of December 4, 1986 disagreed: "This unnecessary provision misjudges the values of Canadians and takes the criminal law into areas where it does not belong."

According to *The Edmonton Journal* of December 6, 1986: "The so- called good samaritan law, should spur Canadians to think about their responsibilities as citizens and their obligations to society.... If Canadians hold that the state cannot dictate moral conduct in such areas as pornography, how can a good samaritan law be justified?"

2) Assessment of the proposal

From the standpoint of Emergency Preparedness Canada, the imposition of a general legal duty to render assistance backed with the sanctions of the criminal law might bring certain benefits. It might make it easier for those vested with special powers to requisition assistance during times of emergency to secure the immediate and complete co-operation of those approached. The general criminal law might reinforce their special, temporary emergency powers. This assumes, of course, that there have been problems in the past in getting such co-operation, but there is little evidence that this is the case. Enshrining in the criminal law the moral obligation not to walk away if one person sees another in peril might educate the individual about his responsibilities in times of emergency and serve as a prod to those who might otherwise hesitate - assuming, again, that such a pointed reminder is needed.

As has been pointed out elsewhere in this study, the notorious cases of callousness that prompted a few U.S. jurisdictions to enact the kind of criminal offence now being proposed by the Law Reform Commission do not have any parallel in Canada. Those who lobby for reform in Canada are hard-pressed to cite concrete examples where able-bodied individuals have deliberately refused to render assistance to someone in peril when they were able to do so without risk to themselves. The Law Reform Commission uses hypothetical situations to support its recommendation, not actual instances. There appears to be no tangible evidence of any pressing need for the intervention of the criminal law and no available evidence of its probable effect.

Some argue that the Law Reform Commission is wrong in principle to recommend the creation of a new criminal offence in the face of a total lack of evidence of that any practical problem really exists. The arguments in its favour are logical and reasonable but they are all theoretical. On the other hand, the Commission is attempting to write an entirely new Code and if one accepts as a philosophical starting point that the "criminal law is designed to reinforce fundamental social values..."[2] the absence of any concrete instances where one person has deliberately and unjustifiably refused to render assistance to another in peril is no obstacle to making such conduct a criminal offence. But not everyone shares this view of the proper role of the criminal law, as is evident from some of the reactions to the recommendation noted above. Some argue that there is no room or reason for the intervention of the criminal law unless it can be shown that other means of social control are inadequate. The absence in Canada of any litany of cases where individuals have ignored their moral obligations to render emergency assistance lends support to those who question whether the criminal law is the right vehicle for reform.

It is difficult to predict what impact, if any, such a provision might have on community norms or social behaviour, for virtually no reliable empirical evidence is available. No research on this question was carried out by the Law Reform Commission, and a search of the literature has turned up only two studies, both of which are dated and of limited value.

The first is the Zeisel study.[3] In 1965, an American professor carried out what he described as an international experiment on the effects of making the failure to rescue a criminal offence. Selected groups of university students in Germany (where the obligation to render assistance is imposed by the criminal law) and in the United States and Austria (where it is not) were presented with four typical "samaritan" situations where someone had either walked away or refused to assist. The students were asked how they would (and should) have acted in each case. The Zeisel study found that most of the respondents (none of whom were law students) knew whether or not they had a legal duty to help: 86% of the Germans knew they were required by law to render assistance while 81% of the Americans knew that they were under no such legal obligation. This might lend support to those who argue that inserting a duty in the Criminal Code might have some educational value.

At the same time, the Zeisel study found that the existence of a legal duty had little effect on the personal behaviour of those interviewed: 63% of the Germans (who were under a legal duty to do so) and 61% of the Austrians and 56% of the Americans (who were not) reported that they would have rendered assistance in the given situations. This puts into question the impact, if any, of introducing a similar duty into the Criminal Code.

The other study is a survey of the the members of the Ontario Medical Association undertaken in 1971 by Messrs. Sharpe and Gray. As indicated earlier, [4] this survey revealed, in contrast to the findings of a similar survey among American doctors, that a remarkably high percentage of Ontario physicians would stop and volunteer administer assistance in a roadside emergency. The survey confirmed the finding in the Zeisel study that most people (or at least Ontario physicians) know whether the law obliges them to stop and render assistance. It also found that 80% of the respondents were in favour of imposing a legal duty on everybody to provide assistance to someone in danger. In 1971, most Ontario physicians favoured the approach now being advocated by the Law Reform Commission.

In principle, it would appear that making the failure to rescue a criminal offence is unlikely to do any harm, and its effects, though slight and perhaps invisible, might well be beneficial.[5] Such evidence as there is suggests that the real utility of such a provision lies less in the coercive nature of the penal sanction than in the educational value of having a legal duty to render assistance enunciated in the criminal law, where it might serve as a public reminder to all of the responsibilities one bears toward one's fellow human beings.

But whatever merits in principle, the recommendation of the Law Reform Commission has certain serious technical shortcomings.

The recommendation is incomplete for it deals with only one of the key issues concerning the legal treatment of the good samaritan, namely, the duty to render assistance. It makes no provision for compensating those who do their duty but suffer injury or losses in the process.

It is possible at present for a good samaritan who does his moral duty to find himself out of pocket because his legal right to recover compensation for injuries or other losses depends on proof of negligence (or "fault" in Quebec) by the victim or a third party. However, in the common law provinces, a person is not obliged to render assistance to a stranger and in Quebec there is no penalty for failing to do so. If an individual is now to be compelled by the criminal law to render assistance, as the Law Reform Commission recommends, it seems only fair that the law should also ensure that he is compensated for injuries and losses sustained while obeying the law. The absence of such a provision is a serious flaw in the Commission's proposal.

The idea of compensating someone for injuries or losses suffered in the performance of a duty of imposed under the Criminal Code is not new. Under section 119 of the Criminal Code, a person is compelled to assist police officer in the execution of his duties, if requested to do so. It is a criminal offence to refuse such assistance without reasonable excuse. Every provincial criminal injuries compensation board is empowered to award compensation to anyone injured while providing such assistance. Most of the money used for such awards comes from the federal treasury.

The issue of compensation is an important one and might be dealt with in one of two ways. Parliament could create a tribunal to compensate those who suffer injury or loss while carrying out their duty under the law to render assistance in an emergency. There are several federal tribunals for awarding compensation that might serve as possible models.[6]

Alternatively, compensation could be awarded through the existing framework of provincial criminal injuries compensation boards which now exist in virtually every province. The extension of their powers to authorize compensation to be paid to those compelled by law to render assistance to someone in peril would, however, require legislation by the provinces. The boards might also have to be renamed.

Whichever means are selected, it is important that some arrangements be made to provide compensation to the injured rescuer. The failure of the Commission to make any provision to deal with this issue, or even to recognize it at all, weakens its own recommendation.

The language of the proposed exception to the new rule is unnecessarily vague. It excuses a person from the duty to render assistance if to do so would risk death or serious harm to himself or another "or where he has some other valid reason for not doing so."

This phrase is borrowed almost word for word from section 2 of the Quebec *Charter of Human Rights and Freedoms*. Commentators have long puzzled over the significance of the phrase in section 2 of the Charter and the same phrase seems equally meaningless in the current context. It has attracted the criticism of the Association of Chiefs of Police and could safely be excised from the provision without adversely affecting its scope.

2. The Negative Liability Approach

The negative liability approach focuses on protecting a good samaritan from liability for negligence, instead of using the criminal law to oblige him to act. The proposals for such legislative reform take one of two forms:

- The adoption by all provinces of general legislation relieving a good samaritan who provides emergency assistance from liability for negligence. Five provinces and the two territories already have such legislation. There is currently in the Ontario legislature (as there has been annually for more than 10 years) a Private Member's Bill to protect the good samaritan in this manner.

- The amendment of certain statutes, both federal and provincial, to confer such protection upon a good samaritan who volunteers in specific kinds of emergencies. The Propane Gas Association of Canada has requested the federal government to add such a provision to the *Transportation of Dangerous Goods Act*. The purpose of the provision would be to protect its members, and others, who currently provide assistance in dealing with spills and other hazards on a voluntary, co-operative basis, from liability in negligence. Transport Canada has reviewed the proposal and appear to favour it.

1) Constitutional considerations

To limit a person's ordinary rights to recover damages for the tort for negligence is to restrict his property and civil rights. From the federal standpoint, therefore, any proposals to undertake reform of this kind by means of federal legislation should be evaluated carefully for their constitutional feasibility as well as their utility in other respects.

The first type of proposal involves a purely provincial initiative and therefore raises no problem so far as its constitutional feasibility is concerned. Its inherent usefulness, however, is another matter. This is discussed below.

The second type of proposal, exemplified by the request of the Propane Gas Association to amend the *Transportation of Dangerous Goods Act*, does pose problems from a constitutional perspective. Some federal statutes do contain provisions limiting or excluding civil liability for negligence. In fact, such a provision can be found in the *Transportation of Dangerous Goods Act* itself. Section 17(5) of that *Act* states that:

> 17(5) Any person requested to act under subsection (3) is not personally liable either civilly or criminally in respect of any act or omission in the course of complying with the request unless it is shown that he did not act reasonably in the circumstances.

It is questionable whether such a provision would be upheld by a court as a defence to a suit in negligence. Even more dubious from a constitutional standpoint is the kind of "good samaritan" provision desired by the Propane Gas Association and apparently being contemplated by Transport Canada. It is understood that even if the Association were successful in obtaining the amendment it wants at the federal level, it plans to seek matching provisions in provincial legislation dealing with the transportation of dangerous goods and environmental spills. If it gets the amendments to provincial legislation, the protection of the good samaritan in such circumstances from liability in negligence will rest on much firmer constitutional grounds than if the only protection lies in the federal statute.

2) Utility of the Negative Liability Approach

As indicated earlier, the "negative liability" approach is predicated on the belief that the most productive way to encourage people to render assistance in an emergency is to leave the ultimate decision to the conscience of the individual and quell any fears they may have about the legal risks incurred by volunteering to help.

But as has been shown, the fears are groundless so far as the question of liability for negligence is concerned. There is not a single reported case in Canada in which a good samaritan has been held liable to the person he has tried to help. The standard of conduct imposed on the rescuer both by the common law and the Quebec Civil Code take into account the demands of the moment. There will be no liability for anything less than gross negligence in the circumstances, a standard that would protect all except the reckless or malicious who deserve no protection.

The fears are also groundless so far as the risk of being sued is concerned. Enquiries with insurance companies and interested parties have failed to turn up any examples of claims made against good samaritans. It is significant that the the Canadian Medical Protective Association knows of no claims of malpractice against any doctors acting as good samaritans, since doctors are often cited as one of the groups most vulnerable to such claims and in need of protection. It has also gone on record as opposing as unnecessary the enactment of legislation conferring immunity upon the good samaritan. The Propane Gas Association of Canada, although pressing for statutory protection for the volunteer, is unable to confirm any instances where its members have been sued or threatened with suit as a result of acting as good samaritans.

The supporters of this kind of legislation generally point to the experience in the United States and the numerous statutes of this kind in virtually every state. However, there are only a handful of reported cases in which the good samaritan statutes have been used, there is a considerable body of academic commentary criticizing their *raison d'être* and the trend in recent years has been to abandon this approach in favour of using the criminal law to impose a duty to assist in an emergency.

Those who favour the negative liability approach generally answer the objection that the fear of being sued for negligence is groundless in at least two ways. They point out that the Canadian public is becoming more litigious and that the chances of being sued are growing, even

if the risks of being held liable are not. The expense and anguish of defending a legal suit are a sufficient deterrent to give would-be samaritans reason to pause. Secondly, the fact that their fears may be groundless does not necessarily change their perceptions, or those of insurance companies when setting premiums for liability insurance. A statute protecting the good samaritan from liability for negligence would be amply justified if it served to alter those perceptions and lower insurance costs.

Unfortunately, there is no empirical evidence against which the claims on both sides can be tested. The case for reform of this kind rests largely on suppositions.

Two further considerations deserve mention. First, if the underlying objective of the negative liability to others approach is to encourage the citizen to volunteer his assistance in times of emergency, then surely provision should be made to protect the good samaritan not only from liability to others but also against loss to himself. The fear of being injured or suffering out-of-pocket losses without any means of recovery might be expected to affect the conduct of a would-be samaritan. And, unlike the fear about being held liable in negligence, these concerns would not be groundless, at least not in law. One would have thought that a statute designed to encourage the citizen to act as a good samaritan would include a provision for indemnification as well as confirm his exemption from liability for negligence. Yet none of the statutes in force in Canada contains such a provision, possibly because someone would have to be held responsible for indemnifying the good samaritan. If the predicament of the victim arose through no one's fault, the responsibility for compensation might have to fall upon the State.

Secondly, the "good samaritan" statutes in Canada were in no small measure the result of lobbying by the medical profession. The statutes reflect their origin in the fact that, with one exception, the only kind of emergency assistance protected is medical assistance in one form or another. The legislation generally protects the layman who renders first-aid at the scene of an accident from liability for negligence but not if he rescues a child trapped in a well. Even if they were otherwise satisfactory, the statutes are not broad enough to serve as useful models.

II. Conclusions and Recommendations

At the beginning of this paper it was suggested that the law dealing with the good samaritan is out of step with morality. However, despite all its flaws, there appears to be no convincing evidence that the present law has produced any cases of rank injustice or a general reluctance on the part of the public to step forward and help a stranger whose life or safety is in sudden peril. If the case for reform demands hard evidence of serious problems that cannot be resolved satisfactorily by the existing law, the case has not been made. As a practical matter, there is much to said for leaving the law as it is.

At the same time, while there is no urgent, practical need to reform the law, it could certainly be improved. If this is a sufficient reason to warrant reform of the law dealing with the rights, duties and liabilities of the good samaritan, then Emergency Preparedness Canada might consider the following approach:

- The basic recommendation of the Law Reform Commission should be supported in principle, but not in its present form. The adoption of a positive duty of "easy rescue" backed by penal sanctions has significant advantages over the "negative liability" type of reform, not the least of which is that it can be achieved by federal legislation and imposed uniformly.

- The imposition of a duty to rescue should be accompanied by the right to receive compensation from the State for injuries and out-of-pocket expenses incurred

while doing one's duty. This was not included in the recommendation of the Law Reform Commission but would seem to be an essential part of any reform that imposes a duty on the citizen to intervene.

- To complement these reforms and to deal with an aspect of the law that probably lies beyond the constitutional authority of the federal governement, support should be given to any provincial initiative to enact uniform legislation protecting a person from civil liability for negligence as a result of obeying the duty to render assistance proposed by the Law Reform Commission. The main rationale for this suggestion is similar to that put forward when recommending that the duty to render assistance should be coupled with a right to be indemnified against losses. If the good samaritan is to lose his freedom of action, he should be entitled to some protection from civil liability. There is also nothing to be lost by using both the "carrot" as well as the "stick" approach to galvanize the citizen into action. It might also satisfy those who believe that the fundamental problem is one of perception. However, unlike the earlier recommendation, the risks of civil suit are small and the existence of such complementary legislation, though desirable, would not seem as essential to any scheme of reform.

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1 Law Reform Commission of Canada, Report 30 (1986) Vol. 1, Recodifying Criminal Law, p. 64.

2 Id. at p. 7 and the controversial preamble to the Code.

3 Zeisel, An International Experiment on the Effects of a Good Samaritan Law, in The Good Samaritan and the Law (ed Ratcliffe 1966) at 209ff.

4 Gray and Sharpe, Doctors, Samaritans and the Accident Victim (1973) 11 Osgoode Hall L.J. 1, noted in Part 1 of this study at p. 14.

5 It has been argued by some legal economists in the United States that imposing a duty to rescue might be inefficient on a costs-benefits analysis. The costs of enforcing the duty to rescue are cited as an important and unknown factor. Such costs, though unknown here, too, are likely to be higher in the United States than in Canada, given the apparent differences in the willingness of the citizen to volunteer. See Rubin, Costs and Benefits of a Duty to Rescue (1986) 6 Int. Rev of Law and Economics 277.

6 See, for example, The Claims Regulations enacted pursuant to the Financial Administration Act, the National Defence Claims Orders, the Penetentiary Inmates Accident Compensation Regulation and others noted by Iacobucci in Les perspectives du gouvernement fédéral canadien - The Future of Personal Injury Compensation (1987) 18 R.G.D. 13.

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